No. 2693

United States

Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellant,

vs.

DAVENPORT INDEPENDENT TELEPHONE COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

TURNER & GERAGHTY, Columbia Building, Spokane, Washington,

Attorneys for Plaintiff and Appellee,

and

POST, RUSSELL & HIGGINS, Exchange Bank Building, Spokane, Washington,

Attorneys for Defendant and Appellant.

[1*]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Complaint.

To the Honorable Judge of the District Court of the United States, for the District aforesaid:

The plaintiff, Davenport Independent Telephone Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said State, having its principal office at Spokane, State of Washington, brings this its bill against the Pacific Telephone and Tele-

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*Page-number appearing at foot of page of original certified Record.

graph Company, defendant, a corporation organized and existing under and by virtue of the laws of the State of California, and a citizen of said State, having its principal office at San Francisco, in said State.

And your orator shows and alleges:

I.

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said State, and that its principal office is at Spokane, in said State, and that the defendant is a corporation organized and existing under and by virtue of the laws of the State of California, and a citizen of said State, and that its principal office is at San Francisco, in said State, and that the amount in controversy in this cause, as hereinafter shown, is more than three thousand dollars in value, exclusive of interest and costs.

II.

That on the 20th day of June, A. D. 1914, the plaintiff was [2] the owner and in possession of, and in the operation of, a telephone system in Lincoln County, in the State of Washington, consisting of approximately three hundred miles of telephone wires, strung on poles, in said county and reaching and serving the several towns and communities in the said county, and also a local exchange in Davenport, in said county, with wires and poles in said town for the accommodation of the residents of said town, and connecting with the suburban lines before described for the accommodation of the several suburban communities in said county. The plaintiff

was also, on said date, the owner of and in possession of a large number of telephone poles, cross-arms, insulators, and other material usually kept on hand by telephone companies for the purpose of operation and repair, of large value, and was also the owner of and in possession of, as a part of its said telephone system, of storage batteries in duplicate, motor generating charging set with usual power board equipment, modern common battery switchboard, harmonic converters in duplicate, two hundred telephone instruments in use by its customers and of a large variety of other property as a part of and appurtenant to its telephone system. The plaintiff was also the owner of and in possession of a telephone line extending from Davenport, in Lincoln County, to the City of Spokane, in Spokane County, which was employed by plaintiff's system and another independent system in Lincoln County, as a toll line for connections with the said City of Spokane. All the wires of plaintiff's said system, including the toll line to Spokane, were carried by poles, equipped with cross-arms and insulators, set in the public highways of said Lincoln and Spokane Counties, under and pursuant to law of the State of Washington conferring upon telephone companies the right to so use and employ said highways, or were conducted on poles over and across the lands of private individuals under grants of easement by said private individuals to maintain the said lines on their premises, and by virtue of said laws and private grants, plaintiff owned, and held and possessed public or private [3] easements for the maintenance of all its telephone lines as hereinbefore described.

III.

That on said 20th day of June, 1914, the defendant made to the plaintiff an offer in writing to purchase its telephone system or so much thereof as it might lawfully acquire, in words and figures as follows:

"THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY.

Office of the Division Commercial Superintendent.
C. E. HICKMAN. Spokane, June 20, 1914.

Mr. A. T. WEST,
Spokane, Washington.

Dear Sir:

Confirming our conversation of to-day:

1. In the event of the consolidation of the two exchanges now in Spokane the Pacific Telephone and Telegraph Company agrees to make a contract with the Davenport Independent Telephone Company, giving the Davenport Company a connection with the consolidated exchange and through that exchange with the system of the Interstate Company under the same terms and conditions as that connection is now given to the Davenport Company by the Home Telephone Company of Spokane.

2. In the event that the Davenport Company desires to sell its property to the Pacific Company and so notifies the Pacific Company in writing within sixty days from this date, an appraisement shall be made of the reproduction value, new, of the property of the Davenport Company by you, representing the Davenport Company, and by one of our engineers, representing this company, and in the event of your failure to agree with our representative, the value

is to be fixed by a third person selected by you and our engineer, and the Pacific Company will thereupon pay the amount so fixed, and the Davenport Company will thereupon convey to the Pacific Company that portion of its property which the Pacific Company may lawfully acquire, the title to such property to be acceptable to the attorneys for this company.

Our Mr. Hickman is authorized to take up with you any matters in this connection.

Yours very truly,
G. E. McFARLAND,
President."

HDP/AM.

That on the 10th day of August, A. D. 1914, the plaintiff accepted the said offer to purchase its said system by a writing in words and figures as follows: [4]

"Spokane, Wash., Aug. 10th, 1914.

The Pacific Telephone and Telegraph Co.,

Mr. G. E. McFarland, President, San Francisco, Calif.

Mr. C. E. Hickman, Div. Com'l. Sup't., Spokane, Wash.

Gentlemen:

Please be advised that we desire to sell our property to you in accordance with conditions outlined in President McFarland's letter of June 20th, last,

addressed to the writer.

Yours very truly,
DAVENPORT INDEPENDENT TELEPHONE CO.
By A. T. WEST,
President."

That thereafter the defendant, pursuant to the terms of said offer and acceptance, appointed H. J. Tinkham as its engineer to act with A. T. West, the president of the plaintiff corporation, in making an appraisement of the reproduction value of the property of plaintiff for the purpose of fixing the price to be paid by the defendant therefor, and the said appraisers, at large expense to the plaintiff, examined the said property and, on the 5th day of October, 1914, fixed the said reproduction value at thirty-four thousand six hundred twenty-three and no/100 dollars ($34,623.00), by a writing in words and figures as follows:

"Price agreed upon as reproduction cost of Davenport Ind. Tel. Co. property, $34,623.00.

H. J. TINKHAM.
A. T. WEST."

Spokane, Wn., Oct. 5th.

IV.

That the said contract, after the said appraisement, was in part performed by the delivering by plaintiff to the defendant of approximately five hundred and twenty-five telephone poles, some with cross-arms, being a part of the property belonging to plaintiff's system and included in the property appraised as hereinbefore alleged.

V.

That plaintiff is in possession of and is the legal owner of all the property before described and belonging to its said telephone system, and can make good and indefeasible title thereto and has repeatedly offered the defendant, since the said appraisement was [5] made, to make title to it by good and sufficient conveyance, of all the property belonging to said system, or of such part thereof as defendant may declare itself lawfully entitled to acquire, and has demanded of it that it receive such conveyance and pay the plaintiff the purchase price as fixed by the said appraisers, but the said defendant has refused and ever since has refused to accept a conveyance to said property or to pay to the plaintiff the purchase price thereof.

VI.

That the defendant as an excuse for the breach of the said contract pretends that it is precluded by the anti-trust laws of the United States from acquiring any part of the property belonging to the plaintiff's system, and that its contract so to do was and is contrary to the said laws and not binding on it, but plaintiff alleges the fact to be that none of the telephone lines belonging to it come in competition with any telephone lines belonging to the defendant, except the toll line before described extending from Davenport, Washington, to Spokane, Washington, and that the right to acquire such line was discussed between plaintiff and defendant prior to its offer of June 20th, 1914, and that the status of the said line and the want of ability of the defendant to lawfully ac-

quire it, if indeed there be such inability, was as well known to it then as it is now. Plaintiff further alleges that none of the telephone lines belonging to it, except the said toll line, come in competition with any telephone lines operated by the defendant under lease or otherwise, except that defendant connects its line at Davenport with the telephone lines of Farm and City Telephone Company, a copartnership, and a competitor of plaintiff in Lincoln County, under an agreement revocable by it at any time on thirty days' notice.

VII.

That the value of the said telephone plant is dependant largely on its continued maintenance and operation as a going concern, [6] and defendant has paid and expended approximately two hundred dollars ($200.00) per month over and above the receipts of the system since the 5th day of October, 1914, in such maintenance and operation, and will be required to expend a like sum monthly until the defendant, under and pursuant to the terms of its said contract, takes said system over, which said sums of money constitute a fair charge on the said property to be paid by defendant to plaintiff.

VIII.

That the plaintiff is still ready, willing and able to make title to all or any part of the properties belonging to its said system, and now tenders, whenever the said defendant shall elect the part of the properties of said system it is willing to receive, or in default of such election, on the judgment of this Court determining that the defendant may lawfully

acquire from plaintiff any part of, or all of, the properties of its said system, to deposit in the registry of this court for defendant, in accordance with said judgment, good and sufficient bills of sale and deeds of conveyance, vesting in and assuring to defendant the title and possession of said properties.

WHEREFORE, Plaintiff prays judgment that the defendant be required to specifically perform its said contract by paying into the registry of this court for the benefit of plaintiff, within a time to be fixed by the Court, the sum of thirty-four thousand six hundred and twenty-three dollars ($34,623.00); and the further sum as the Court may find to be due plaintiff for maintenance and operation of the system as in this bill described; that the Court fix and determine the properties which defendant may lawfully acquire from the plaintiff, under the said contract, and that upon the failure of defendant to pay into the registry of the court the sums of money aforesaid, that the Court order the said properties to be sold under and in accordance with the practice of the court, for the benefit of plaintiff; and that plaintiff have a deficiency judgment for any sum [7] or amount due it over and above the sum realized from the sale of said property, and for such other and further relief as to the Court shall seem meet and equitable.

(Signed) TURNER & GERAGHTY,
GEORGE TURNER,
Attorneys for Plaintiff.

[Endorsements]: Complaint. Filed in the U. S. District Court for the Eastern District of Washing-

ton, January 26, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [8]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Answer.

For answer to the bill of complaint of the plaintiff in the above-entitled cause, the defendant alleges as follows:

1.

Admits the allegations contained in paragraph 1 of the complaint.

2.

In respect to paragraph 2 of the complaint, admits that on June 20, 1914, the plaintiff was in possession and in operation of a telephone system in Lincoln County, in the State of Washington, consisting of approximately 300 miles of telephone wires strung on poles in said county and reaching and serving the towns of Davenport, Reardan and Peach in said county, and also a local exchange in Davenport consisting of wires and poles therein, the same being

connected with the said suburban lines described above; but denies that said system reached or served any other towns or communities in said county except Davenport, Reardan and Peach, and denies that the plaintiff was the owner of the local exchange in Davenport, or any part thereof, or had any franchise, license or permit authorizing it to operate a telephone exchange in said town or in any other town or community in said county, or to do any telephone business in any of said towns or communities.

Defendant admits that on said date the plaintiff was in [9] possession of a large number of telephone poles, cross-arms, insulators and other material usually kept on hand by telephone companies, of the value of about $3,500, and was also in possession of storage batteries in duplicate, motor-generating charging set, with usual power board equipment, modern common battery switchboard, harmonic converters in duplicate, 160 telephone instruments in use by customers, and of other property ordinarily in use in a telephone system; but it has no knowledge as to plaintiff's ownership thereof, except that the defendant alleges that it was not the owner of any part of said property which was connected with or formed any part of the local exchange in Davenport.

Defendant admits that plaintiff was in possession of a telephone line extending from Davenport, in Lincoln County, to the City of Spokane, in Spokane County, which was used as a toll line for connection with the City of Spokane and other towns in eastern Washington and in northern Idaho by patrons of

the telephone exchanges at Davenport and Reardan, and other persons doing business in various points in Lincoln County.

Defendant admits that the wires referred to in said paragraph 2 were carried on poles equipped with cross-arms and insulators, some of said poles being set in the public highways of Lincoln County and Spokane County, and some of said poles being set upon land owned by private individuals; but defendant denies that the plaintiff had any grants of easement from such private individuals for the maintenance of said lines on their premises, and denies any knowledge or information sufficient to form a belief as to whether the plaintiff ever complied with the laws of the State of Washington in respect to the locating and maintaining of telephone poles on public highways, and defendant denies that the plaintiff owned, held or possessed any public or private easements for the maintenance of said telephone lines. [10]

3.

In respect to paragraph 3 of the bill of complaint, defendant denies that it made to the plaintiff any offer in writing or otherwise to purchase its telephone system, or any part thereof, but admits that on or about June 20, 1914, its president signed and delivered to one A. T. West a letter or paper writing, a copy of which is set out in paragraph 3 of the complaint, and admits that some time later, and in the month of August, 1914, defendant received from said West a letter, a copy of which is set out in paragraph 3 of the complaint.

Defendant admits that before the title to said property had been examined by its attorneys, and before the validity of said paper writing had been considered or passed upon by defendant or its attorneys, it requested H. J. Tinkham, one of its employees, to act with Mr. West in making an appraisement of the property which the plaintiff claimed to own, and that such appraisement was made without expense to the plaintiff, and that said West and said Tinkham signed a paper writing in relation thereto, a copy of which is set out in paragraph 3 of the complaint.

Defendant further alleges in respect to the paper writing dated June 20, 1914, that the same was executed and delivered by the president of the defendant without any consideration of any kind or character being given therefor, and that the same did not constitute any contract on the part of this defendant, and was void and unenforceable for that reason, and also that that part thereof referring to the purchase of certain property was void and unenforceable because it was in violation of an Act of Congress of the United States, and of the Statute of Frauds of this State, as is hereinafter more fully alleged.

4.

In respect to paragraph 4 of the complaint, this defendant alleges that it is not true that the said alleged contract, after [11] the said alleged appraisement or at any other time, was in part or at all performed by the delivering by plaintiff to the defendant of approximately 525 telephone poles, or

any telephone poles, or by the delivery of any property or in any other manner. That the facts in relation to said matter are as follows: In the latter part of October, 1914, there was a conversation between H. J. Tinkham, Division Superintendent of Plant of the defendant, at Spokane, and said A. T. West, in relation to the defendant purchasing certain poles that said West or the plaintiff claimed to own, and the understanding between the parties in relation thereto was reduced to writing and is set forth in a letter written by said Tinkham to said West, dated October 31, 1914, which, omitting the address, is as follows: "Confirming our understanding relative to the purchase of poles from stock at Davenport, and also the removal and use of the pole lead between the State road and Cheney; will you kindly confirm our understanding if this will be satisfactory to you. The understanding is that in the event that the sale of the supplies and plant as agreed upon originally between this company and you is not for some reason carried out, that we will pay you for the poles we have and will take from stock a fair market price, and that we will pay you for the poles between Cheney and the State road a price equal to the reproduction cost, new, of same, the unit cost being as agreed upon in the original inventory. Will you kindly acknowledge this understanding. Yours truly, H. J. Tinkham, Division Superintendent of Plant."

On November 5, 1914, said West wrote a letter to Mr. Tinkham in relation to this matter, which, omitting the address, is: "Referring to your letter of

the 31st ultimo, the arrangement outlined is entirely satisfactory in so far as it refers to poles taken or to be taken from the yard at Davenport, but in reference to the poles between Cheney and the State road, I should like the option of requiring you to replace with new poles of the same class and fitted [12] with the same character of fixtures, etc., such poles as you remove, in the event that the general sale of plant and supplies now pending should not be consummated. With this understanding there is no objection to your removing the poles as required. Yours truly, Davenport Independent Telephone Company. A. T. West, President." Under this agreement defendant took certain poles from stock of the value of $751.30, and certain poles between Cheney and the State road of the value of $520.32, and before the commencement of this action defendant offered to said West to pay said amounts, together with certain expenses for loading, which said West claimed defendant should pay, amounting to about $40.00, but said West refused to accept such payment.

5.

In respect to paragraph 5 of the complaint, the defendant denies that the plaintiff is the owner of all the property described in the complaint, or of any property except the toll lines referred to in paragraph 2 hereof, and denies that the plaintiff can make good, indefeasible or marketable title to any other property than said toll lines, and that as to such toll lines, defendant denies that plaintiff has any easements, public or private, for the mainte-

nance thereof; and denies that the plaintiff has repeatedly, or at all, offered to the defendant to make title to it by good or sufficient conveyance of all or any of the said property; but admits that said West has stated to the defendant that the plaintiff would execute an instrument purporting to be a deed of conveyance of all the said property, or any part thereof, that the defendant might desire conveyance of and deliver such instrument upon being paid the sum of $34,623.00, which sum said West has demanded that the defendant should pay to him, and the defendant admits that it has refused to accept the delivery of such an instrument and has refused to pay said sum of $34,623.00.

6.

In respect to paragraph 6 of the complaint, defendant admits **[13]** that it has stated to said West that it is precluded by the anti-trust laws of the United States from acquiring said property, but denies that it has made that statement as an excuse for the breach of said contract, and denies that there is or ever was any contract between the defendant and the plaintiff, or that it has broken the same in any manner whatsoever.

Said defendant admits that it has stated to said West that said paper writing of date of June 20. 1914, was not a contract, and that subdivision 2 thereof was, as defendant has been advised by its attorneys, unenforceable under the anti-trust laws of the United States, and that the title to the property which said West claimed to belong to the plaintiff was not acceptable to the attorneys for the de-

fendant, but that the defendant would make a contract with the plaintiff as is provided by paragraph 1 of said paper writing of June 20, 1914.

Defendant denies that none of the telephone lines which the plaintiff asserts belong to it, and which are referred to in said paper writing of June 20, 1914, are or were in competition with any of the telephone lines belonging to the defendant, except the toll line extending from Davenport to Spokane; and defendant alleges in respect thereto that the competition between the said telephone lines will be in a subsequent paragraph hereof more fully set forth and described.

Defendant denies that the right to acquire such line was discussed between the plaintiff and the defendant prior to the signing of the paper writing of June 20, 1914, and denies that the status of said line, or the want of ability of the defendant to lawfully acquire it, or the want of ability of the plaintiff to lawfully convey it, was as well known to it then as now, and defendant alleges in respect thereto that the defendant was not fully advised in respect to the status, condition, location or business of said lines on June [14] 20, 1914, or at any time theretofore, and did not at said time desire to purchase or acquire the same, and executed and delivered to said West said paper writing on said date at his instance and request, and the same was executed and delivered without any lawful consideration of any kind or character.

In respect to the last sentence of paragraph 6 of the complaint, defendant alleges that the Farm &

City Telephone Company referred to now owns and operates, and has for many years owned and operated, a telephone exchange at Davenport in said Lincoln county and also a telephone exchange at Reardan in said county, together with telephone lines radiating from said towns in different directions for many miles in Lincoln County, which telephone lines and system cover the same territory as that which it is alleged in the complaint is covered by the telephone system which the plaintiff alleges itself to be in possession and operation of, and said Farm & City Telephone Company also covers other territory and serves the public in other localities in which the telephone system which the plaintiff claims to own is not and never has been in operation. That said system of the Farm & City Telephone Company was in operation for many years before the incorporation of the plaintiff, and before the construction of any of said telephone lines which the plaintiff now claims to own; that said Farm & City Telephone Company is a sub-licensee of this defendant, operating under a contract whereby its system is connected with the telephone system of this defendant, and under which the patrons of the Farm & City Telephone Company may not only have telephonic communication over the lines of this defendant to the City of Spokane and the inhabitants thereof, and to other parts of Eastern Washington, but also to the City of Coeur d'Alene and to nearly all of the various towns, cities and communities of the State of Idaho in the northern part thereof, and such business and telephonic communication was daily had and held both

from the State of Washington into the State of Idaho, and from the State of Idaho into [15] the State of Washington, by the inhabitants of the respective States, one with the other, on June 20, 1914, and for many years theretofore, and ever since.

That the telephone line and system which the plaintiff claims to own or operate was on June 20, 1914, and had been for some time theretofore connected with an exchange in the City of Spokane, owned by the Home Telephone Company of Spokane, referred to in paragraph 1 of said paper writing of June 20, 1914, and through that exchange, with the toll lines of the Interstate Telephone Company, Limited, which operated between eastern Washington and northern Idaho in competition with the lines of this defendant, and telephonic communication was had and held between the citizens and inhabitants of the State of Washington and the citizens and inhabitants of the State of Idaho through and over the property claimed to be owned by this plaintiff, and said long distance toll line of the Interstate Telephone Company, Limited, and the same constituted interstate commerce in competition with the interstate commerce business of this defendant.

And defendant denies each and every other allegation in said paragraph 6 not hereinabove expressly admitted.

7.

In respect to paragraph 7 of the complaint, the defendant denies that the value of the telephone plant which plaintiff claims to own is largely dependent on its continued maintenance and operation as a

going concern, admitting, however, that the value of every telephone plant is dependent to same extent upon its maintenance; and defendant denies that it has paid or expended any sum at any time, in either maintenance or operation of said telephone line, plant or system.

As to whether plaintiff has paid or expended any sum in maintenance or operation over and above the receipts of the system, or will be required to expend any sum in the future for such maintenance [16] and operation over and above the receipts of the system, defendant has no knowledge or information sufficient to form a belief, except that the said West has repeatedly stated to the defendant that said telephone lines or system was making a profit, over and above maintenance and operation and all expenses connected therewith, of the sum of $150 per month.

Defendant denies that $200 per month, or any other sum, constitutes a fair charge on the property to be paid by the defendant to the plaintiff, or that the defendant should pay to the plaintiff any sum whatsoever on account of the matters and things referred to in pararaph 7 of the complaint.

8.

In respect to paragraph 8 of the complaint, the defendant denies that the plaintiff is able to make title to the properties described in the complaint, and each and every other allegation therein contained.

II.

For further answer and by way of defense, defendant alleges as follows:

1.

That said paper writing of date of June 20, 1914, referred to in paragraph 3 of the complaint, together with said paper writing of August 10, 1914, referred to in the same paragraph, do not constitute any contract between the parties hereto, and that there never was any valuable or lawful consideration therefor.

2.

That the attorneys for the defendant have examined the title to the properties referred to in said paper writings, and that such title is not acceptable to said attorneys and they have so advised this defendant, and that as a matter of fact the said plaintiff has not merchantable title to said properties, and especially to the properties constituting the Davenport exchange, and has not even a [17] franchise or permit to operate an exchange in the town of Davenport.

3.

That on June 20, 1914, and for many years theretofore, and ever since, the defendant has been engaged in interstate commerce, in telephonic communication, between the States of Idaho and Washington, as well as between other States, and has owned, controlled and operated telephone lines between nearly all of the cities and towns in the State of Idaho in the northern part thereof, and nearly all of the cities and towns in the State of Washington, whereby the people residing or being in one State may have and do communicate telephonically through the lines thus operated by this defendant

with the people residing or being in the other States.

4.

That on June 20, 1914, and for some time theretofore, and ever since, the toll lines of the plaintiff referred to in the complaint, extending from Davenport and Reardan and other communities in Lincoln County, Washington, to Spokane, Washington, were connected telephonically with the lines of a system which was operating in competition with the telephone lines and system of this defendant between eastern Washington and the northern part of the State of Idaho, which system belonged to the Interstate Telephone Company, Limited, and the Home Telephone Company of Spokane, and there was a contract between the plaintiff and said other companies providing for such connection and the continuation thereof, and by virtue thereof the plaintiff was engaged in interstate commerce in transmitting telephone messages and communications between various points in the State of Washington and the said various points in the State of Idaho, whereby those resident or being in the State of Idaho could and did talk over the said lines operated by the plaintiff with those resident or being in the State of Washington, and conversely.

5.

That in July, 1913, the United States Government brought an [18] action in the District Court for the State of Oregon against this defendant and other companies, for the purpose, among other things, of preventing this defendant from acquiring the property of the Interstate Telephone Company, Limited,

referred to above, and the property of the Home Telephone Company of Spokane, upon the ground that such acquisition would be in violation of an act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," being an act passed on July 2, 1890, and published in 26 Statutes at Large, at page 209, and commonly known as the "Sherman Anti-Trust Act"; and in said action, prior to June 20, 1914, a decree was entered perpetually restraining and enjoining this defendant from acquiring said properties, with the qualification that if the local authorities of the City of Spokane should decide in favor of a consolidation of the two exchanges in the City of Spokane, to wit, the exchange of the Home Telephone Company of Spokane mentioned above and the exchange owned by this defendant, then that said decree might be modified to permit the consolidation of said exchanges only, but with the proviso that the Interstate Telephone Company, Limited, should be connected with and have the benefit of such consolidated exchanges, and said competition in interstate telephonic communication should be continued, all of which was well known to this plaintiff on June 20, 1914; that defendant at said time desired to have the said two exchanges in Spokane consolidated and expected to obtain the consent of the city authorities to such consolidation, as was then known to this plaintiff. That in order to protect the plaintiff in its connection with a local exchange in the City of Spokane, and thereby with the system of the Interstate Telephone Company, Limited, and to protect

it in its said Interstate business, this defendant agreed with Mr. A. T. West as set forth in paragraph 1 of said paper writing of June 20, 1914.

6.

Defendant further alleges in respect to said paper writing [19] of date June 20, 1914, that the telephone line or system described in the complaint was at said time and ever since has been of no value whatsoever to this defendant, being merely a duplication of the said plant owned or operated by this defendant on June 20, 1914, and ever since; and this defendant further alleges that the sale of the property referred to in said paper writing, or any part thereof, by the plaintiff to the defendant, would be in violation of the anti-trust laws of the United States, and especially of that certain Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," being the Act of July 2, 1890, commonly known as the "Sherman Anti-Trust Act," in that the same would be in restraint of trade or commerce in telephonic communication between the State of Washington and the State of Idaho, and would tend to monopolize such commerce, and would also be in violation of the decree in the suit brought by the United States Government against this defendant and others hereinbefore referred to, and said paper writing is void and unenforceable under the provisions of said statute. That at the time of signing the same by the president of this defendant, the real situation in relation thereto was not appreciated and understood by this defendant, and as soon as the matter was submitted to its counsel it

was advised by its counsel that said contract was void and unenforceable for the reasons above stated, among other reasons, and immediately thereafter this defendant notified said A. T. West of said fact.

7.

That said paper writings set forth in the complaint are also void and unenforceable under the Statute of Frauds of the State of Washington, in that: (a) said paper writing of date June 20, 1914, is not signed by the owner of said property; (b) that it does not contain a description of the property or of any property which could be lawfully sold to the defendant; (c) that it does not contain the price and terms of credit and conditions of sale; (d) that it does [20] not contain the full and essential terms of a contract.

8.

Defendant further alleges that this court is without jurisdiction in equity, and that this case is not one of equitable cognizance, but that the plaintiff has a full, complete and adequate remedy at law.

WHEREFORE, Defendant prays to be hence dismissed and have judgment for its costs and disbursements.

(Signed) POST, AVERY & HIGGINS,
F. T. POST,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

G. E. McFarland, being duly sworn, deposes and says: That he is an officer, to wit, the president, of The Pacific Telephone and Telegraph Company, a

corporation, the defendant in the above-entitled action and named in the foregoing answer; that he is entirely familiar with the business of said corporation; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true; that the same is true of his own knowledge, except as to the matters therein stated upon information or belief, and as to those matters, that he believes it to be true.

(Signed) G. E. McFARLAND.

Subscribed and sworn to before me this 12th day of March, 1915.

[Seal] (Signed) FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsements]: Answer. Received copy of within answer this 15th day of March, 1915. (Signed) Turner & Geraghty, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, March 15, 1915, W. H. Hare, Clerk. By S. M. Russell, Deputy. [21]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Opinion.

TURNER & GERAGHTY, for Plaintiff.

POST, AVERY & HIGGINS, for Defendant.

RUDKIN, District Judge.

This is a suit for the specific performance of a contract for the sale of certain telephone property. On the 20th day of June, 1914, the plaintiff was the owner, or at least claimed to be the owner, and was in possession of and operating a telephone system in Lincoln County, consisting of approximately three hundred miles of telephone wires strung on poles, reaching and serving the several towns and communities in the county, and also of a local exchange at Davenport, and a toll line extending from Davenport to the City of Spokane, together with certain supplies on hand and the customary and usual switchboards, batteries, and other accessories. On that date the defendant company addressed to the president of the plaintiff company the following communication:

"Confirming our conversation of to-day:

"1. In the event of the consolidation of the two exchanges now in Spokane, the Pacific Telephone & Telegraph Company agrees to make a contract with the Davenport Independent Telephone Company, giving the Davenport Company a connection with the consolidated exchange and through that exchange with the system of the Interstate Company under the same terms and conditions as that connection is now given to the Davenport Company by the Home Telephone Company of Spokane.

"2. In the event that the Davenport Company desires to sell its property to the Pacific Company and so notified the Pacific Company in writing *with* sixty days from this date, an appraisement shall be made of the reproduction value, new, of the property of the Davenport Company by you, representing the Davenport Company, and by [22] one of our engineers, representing this company, and in the event of your failure to agree with our representative, the value is to be fixed by a third person selected by you and our engineer, and the Pacific Company will thereupon pay the amount so fixed, and the Davenport Company will thereupon convey to the Pacific Company that portion of its property which the Pacific Company may lawfully acquire, the title to such property to be acceptable to the attorneys for this company.

"Our Mr. Hickman is authorized to take up with you any matters in this connection."

On the 10th day of August, 1914, the plaintiff accepted the offer to purchase in the following communication:

"Please be advised that we desire to sell our property to you in accordance with conditions outlined in President McFarland's letter of June 20th last, addressed to the writer."

Thereafter H. J. Tinkham, an engineer appointed by and representing the defendant, and A. T. West, representing the plaintiff, made an appraisement of the reproduction value of the property for the purpose of fixing the selling price, and on the 5th day of October, 1914, such value was fixed at the sum of $34,623.00, by a memorandum signed by the parties as follows:

"Price agreed upon as reproduction cost of Davenport Ind. Tel. Co. property $34,623.00.

Spokane, Wn., Oct. 5th.

H. J. TINKHAM.
A. T. WEST."

The plaintiff has offered to convey the property in conformity with this agreement at the price fixed by the appraisers, but the defendant refuses to accept the same or pay the purchase price.

While considerable testimony was taken at the hearing about the only controversy arose from the denial in the answer that certain poles and cross-arms were delivered to the defendant in part performance of the contract as alleged in the complaint. The testimony of the witness for the defendant on this point

is corroborated by the correspondence between the parties relating to the same subject matter; and that issue I must determine against the plaintiff.

The offer to purchase, the acceptance, the appraisement, the offer to convey and the refusal to accept the conveyance or pay the purchase price, are all admitted. The defendant contends that **[23]** the plaintiff has a plain, speedy and adequate remedy at law, and seeks to justify its refusal to carry out the contract on the following grounds:

1. Because of the Sherman Anti-Trust Act. 2. Because of a decree entered in the District Court of the United States for the District of Oregon in a suit which the United States was plaintiff and the present defendant and others were defendants; and 3. Because of the statute of frauds. The defendant further contends that the plaintiff's title to the property is defective and that the title is not acceptable to the attorneys for the defendant as provided in the contract. Viewed from the standpoint of the plaintiff alone there would seem to be an adequate remedy at law by an action for damages, the measure of damages in such cases being the difference between the contract price and the fair market value of the property. True, there might be some difficulty in proving the market value, but that is an ever-present difficulty in all kinds of litigation. But viewed from the standpoint of the defendant, the remedy at law is plainly inadequate. The property, whether real or personal, is of a peculiar kind not obtainable in open market, and the defendant is entitled to the specific thing contracted for. Per-

formance has been decreed where the specific thing is desired by the plaintiff and cannot be duplicated; for the sale of unique or rare chattels, or chattels having a sentimental value; for the sale of ships, documents, patent rights and copyrights; for the sale of stock having no market value and not readily procurable; for the sale of annuities; debts; judgments; bonds and mortgages. 36 Cyc., et seq.

And if the defendant is entitled to specific performance the same measure of relief must be accorded to the plaintiff. In Raymond v. San Gabriel Val. Land & Water Co., 53 Fed. 883, the Court said:

> "A vendor of real estate, who has executed a title bond [24] conditioned for the conveyance of the land upon the payment of the price, has an election of remedies to recover the purchase money. He may sue therefor at law, or he may resort to equity for a specific performance of the contract by the vendee. Whenever the purchaser has the right to go into equity and compel the execution and delivery of a deed, the principle of mutuality gives the vendor the right to go into equity to compel the vendee to perform the contract on his part by paying the purchase money. This is an exception to the general rule that equity will decline jurisdiction of a suit for a money demand which could be recovered by an action at law. The exception is based on the established doctrine of equity that the right to a specific performance must be mutual, and that it must be enjoyed alike by both parties to every contract to which the jurisdic-

tion extends. In every case, therefore, where the vendee would have the right, by a suit in equity, to compel the execution and delivery of the deed by the vendor, the latter may, by a similar suit, enforce the obligation of the vendee to pay the purchase money."

In a few of the states, such as Massachusetts, where the general jurisdiction of equity is restricted by statute to cases where the legal remedy is adequate a more stringent rule prevails; but the equity practice in the courts of the United States usually conforms to the practice in the Court of Chancery in England and there the doctrine of mutuality is firmly established. I am therefore of opinion that plaintiff may properly invoke the jurisdiction of a court of equity.

The claim that the contract violates the Sherman Anti-Trust Act and the decree of the United States District Court for the District of Oregon is based on the following facts:

On the 10th day of August, 1911, the Washington Consolidated Telephone Company entered into a contract with the Interstate Telephone Company, Limited, and the Home Telephone & Telegraph Company of Spokane, under the terms of which the several companies agreed to interchange business so that messages originating on the lines of the Consolidated Company could be transmitted over the lines of the Interstate Company to various points in Eastern Washington and Northern Idaho. The contract was by its terms to continue in force for a period of ten years and thereafter until one year's written notice

of an intention to terminate it was given by either party to the other. The plaintiff company claims to have succeeded to the rights of the Consolidated Company under this contract, but [25] the other companies have refused to recognize that claim. A small amount of interstate business has been done by the plaintiff company over the lines of the Interstate Company as a matter of accommodation, however, the two companies dividing the tolls according to mileage. The volume of interstate business for the twenty-two months preceding the execution of the contract of sale averaged $1.12 per month. There seems to have been no increase in the interstate business during that period and no prospect of an increase in the immediate future.

From the foregoing statement it seems apparent that the parties to the present contract did not as a matter of fact intend to monopolize or restrain interstate traffic, and it seems equally apparent that their contract does not have that effect as a matter of law, if the rule of reason still obtains. The amount of interstate business transacted in the past has been too insignificant and the possibilities for transacting such business in the future are too remote and too unpromising to bring the case within the prohibition of either the statute or the Oregon decree.

Cincinnati Packing Co. v. Bay, 200 U. S. 179.
Standard Oil Co. v. United States, 221 U. S. 1.
United States v. American Tobacco Co., 221 U. S. 106.
United States v. Union Pac. R. Co., 226 U. S., 61.
Anderson v. United States, 171 U S. 615.

The only objection that can be urged against the

memorandum of sale is, the sufficiency of the description of the property which was the subject matter of the sale. The description is no doubt general, but that is not a valid objection if the subject matter of the contract can be identified from the description given. The parties here evidently fully understood the subject matter of their contract; their agents appointed to appraise the property found no difficulty in locating it from the description given; and in my opinion the description, though general, satisfies the requirements of the statute of frauds. [26]

Numerous exceptions have been taken to the title tendered by the plaintiff and the more important of these will now be considered. Title to a part of the property was acquired through a bankruptcy sale, and title to another part through a foreclosure sale. Objection is made to the title acquired through the bankruptcy sale on the ground that the bankruptcy court lost jurisdiction of the proceedings before the sale was ordered; on the ground of insufficiency of the description of the property in the bankruptcy proceedings; and on the ground that the trustee in bankruptcy purchased the property back from the purchaser at the bankruptcy sale soon after the bankruptcy sale took place. The record shows that the involuntary petition was filed on the 11th day of March, 1913, and that the adjudication was made on the 10th day of April following. On the 13th day of May, 1913, a stipulation signed by the attorneys for the petitioning creditors and the bankrupt to the effect that the proceedings should be dismissed on the ground and for the reason that the claims of the peti-

tioning creditors had that day been fully settled and satisfied was filed. No further proceedings appear to have been taken in the bankruptcy court until an *ex parte* order was made on the 23d day of October, 1913, directing the officers of the bankruptcy court to proceed with the administration of the estate. Attorneys for petitioning creditors in bankruptcy do not seem to realize that they have no control over the proceedings after the adjudication is made. The stipulation was never called to the attention of the Court and was wholly authorized and without force or effect. The order made in October simply required the officers of the bankruptcy court to proceed with the administration of the estate, a duty imposed by law without order or direction from the Court. There is no merit, therefore, in the claim that the Court lost jurisdiction by reason of the stipulation or otherwise. What has already been said as to the sufficiency of the description [27] contained in the memorandum of sale disposes of the objections to the sufficiency of the description in the bankruptcy proceedings. The fact that the trustee in bankruptcy repurchased the property from the purchaser at the bankruptcy sale soon after the bankruptcy sale was made does not affect the title at law or in equity, unless such repurchase was made in pursuance of an agreement entered into before the bankruptcy sale took place. The proof shows that such was not the case. I see no substantial objection, therefore, to the title acquired through the bankruptcy court.

One H. H. Reynolds was made a party to the fore-

closure proceeding in the State court under the general allegation that he claimed some right, title or interest in or to the mortgaged property which was subsequent and inferior to the lien of the mortgage. Reynolds was a nonresident of the tSate, was not served with process, and did not appear in the action. Notwithstanding his absence from the case, for some inscrutable reason, the State court attempted to adjudicate upon his rights and divest him of his interest in the property. The Court found in substance that Reynolds purchased the mortgaged property at receiver's sale; that the report of the receiver was filed and the sale confirmed on the 1st day of May, 1911; that Reynolds bought the property with full notice of the trust deed, for less than its actual value, and that his purchase was subject to the trust deed and burdened with the lien thereof. Of course it is unnecessary to say that the rights of Reynolds in the property could not be divested in this way. There was introduced in evidence at the trial, however, a bill of sale from Reynolds to the grantor in the trust deed bearing date May 8, 1911, and this bill of sale would divest him of any title acquired at the receiver's sale. It was suggested in argument that the finding above referred to was made on the 31st day of May, 1912, more than a year after the execution of the bill of sale, but the finding in favor of Reynolds, [28] as well as the finding against him, in a proceeding to which he was not a party, must go for naught. If there is any evidence in the record that Reynolds had an interest in the property at any time, there is likewise evidence that he conveyed that

interest at a later day and no evidence that he now has or claims such interest. Objection is also made that the franchises were not sold in the mode prescribed by law for that particular class of property. But I am of opinion that so long as the process in the hands of the sheriff was fair upon its face the question whether the sheriff performed his official duties or gave the notice prescribed by law does not concern the purchaser and that a judicial sale cannot be collaterally attacked in this way. This disposes of the principal objections urged against the title, and while there are unquestionably some irregularities I am of opinion that the title of the plaintiff is a marketable one, such as a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept. The memorandum contained a provision that the title should be acceptable to the attorneys for the defendant. No attorneys were mentioned and under such circumstances I do not think that the attorneys should be held to be final arbiters whose decision can only be impeached for fraud or mere capriciousness. I think the tender of a marketable title would satisfy the obligations of the contract, and I see no sufficient reason for holding that the defendant is not bound to accept the title and pay the purchase price in accordance with its promise. A decree of specific performance will therefore go as prayed.

[Endorsements]: Opinion. Filed in the U. S. District Court for the Eastern District of Washington. July 29, 1915. W. H. Hare, Clerk. [29]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

First. That under the terms of the contract of sale described in the complaint there is due the plaintiff from the defendant the sum of thirty-four thousand six hundred and twenty-three dollars ($34,623.00), with interest at the rate of six per cent per annum from the seventh day of June, A. D. 1915, the date of the trial of this cause, and that plaintiff is entitled to have the said contract specifically enforced against the defendant as prayed for in the bill of complaint, and, for the purpose of carrying out and enforcing said contract specifically, it is ordered:

(a) That plaintiff execute and lodge in the registry of this court, within ten days from the date of this decree, good and sufficient deed or deeds of conveyance, vesting in, and assuring to the defendant the title to the property described in the bill of complaint. For the purposes of said conveyance it shall be sufficient to describe the property as follows: A metallic telephone circuit extending from the city limits of the City of Spokane, Washington, to Davenport, Washington, consisting of B. B. telephone wire No. 12, upon cedar poles, the said main line from Spokane to Davenport being approximately forty miles in length; excepting that for a distance of approximately five miles west of Reardan the [30] circuit is supported under license by poles belonging to the West Crescent Farmers' Co-operative Telephone Company, of Reardon; also a telephone line connecting with said main line and running to Reardan, Washington; also a second circuit of copper clad wire between Spokane and Reardan, supported upon above-mentioned pole line; and further including telephone exchange at Davenport, Washington, and all connections and appliances therewith used and all wire, poles, brackets, arms, pins and insulators used in connection with said telephone exchange, all telephones installed and uninstalled and all supplies and equipment on hand; also one Ford automobile, manufacturer's No. 369,762; also the franchise to maintain a telephone system in the town of Davenport, the same having been granted by Ordinance No. 147, of the town of Davenport to the Local & Long Distance Telephone Company, and subse-

quently acquired by plaintiff herein; also franchise granted by the Board of County Commissioners of Lincoln County to the Washington Consolidated Telephone & Telegraph Company, and subsequently acquired by plaintiff; also rural lines owned by plaintiff extending in a westerly direction beyond Davenport approximately one-half mile, and another line running in a northerly direction from Davenport carrying twenty wires and extending approximately five miles, and then branching, one branch taking a westerly course to a point beyond the town of Egypt, approximately thirteen miles from Davenport, from which point to the Town of Lincoln poles and cross-arms are distributed along the route but not installed, the other branch running northerly to a point approximately fifteen miles from Davenport, together with small service laterals radiating from said lines; also rural lines extending southeasterly from Davenport approximately three miles; also a line of poles without wires extending from a point on the plaintiff's main line between Spokane and Davenport about five miles west of Spokane and extending along the county roadways to within approximately one mile of the town of Cheney, in Spokane County, Washington; [31] all stocks and supplies in the company's warerooms at Davenport; all office furniture, fixtures and supplies; all poles and cross-arms in the company's yards at Davenport and in the forest in Stevens County, Washington;—said above-described property, excepting the franchises referred to, being the property, and all of the property, specifically described and inventoried in the schedule introduced in evidence in this cause as Plaintiff's Ex-

hibit No. 2; to which shall be added the following general descriptive clause: "Together with all other property of every character and description, real, personal, or mixed, including public franchises, belonging to the Davenport Independent Telephone Company on the 5th day of October, A. D. 1914."

(b) That within twenty days after the said deed of conveyance shall have been lodged in the registry of the court, the defendant shall pay to the plaintiff, or pay into the registry of the court for the use and benefit of the plaintiff, in good and lawful money, thirty-four thousand six hundred and twenty-three dollars ($34,623.00), with interest at the rate of six per cent per annum from the fifth day of June, A. D. 1915, together with the costs of this action, which costs, in case the money be paid into the registry of the court, shall include one per cent on the principal sum with interest as the clerk's fees for receiving, keeping and paying out the said sum in accordance with the provisions of this decree. Thereafter the said deed or deeds of conveyance shall be delivered to the said defendant and the said sum of money shall be delivered to the plaintiff.

(c) In default of payment by defendant of said sum of money within the time herein specified, it is ordered, adjudged and decreed that the property of the plaintiff, the Davenport Independent Telephone Company, be sold in accordance with the practice of this court, and that the proceeds of said sale, after deducting the cost of this suit and of said sale, be applied to the satisfaction of the sum due the plaintiff under its contract with the defendant, and [32] that plaintaiff have a deficiency judgment for any

sum or amount due it under said contract over and above the sum realized from said sale. In the event of the sale of said property as in this paragraph provided, the deed of conveyance made by the plaintiff to the defendant and lodged in the registry of the court, shall be marked cancelled by the clerk of the court, and delivered to the plaintiff. The plaintiff has leave to apply to the court, after the time for the payment of the money by the defendant as herein provided shall have lapsed, for an order of sale of the property as an entirety, and for such other order in aid of said sale and of the execution of this decree, as may be in accordance with the rules and practice of this court.

Second. That plaintiff have judgment for its costs and disbursements in this action, taxed at —— dollars.

Signed in open court, at Spokane, Washington, this 4th day of September, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsemnts]: Decree. Received copy of within decree this 1st day of September, A. D. 1915. (Signed) Post, Avery & Higgins, Attorneys for Defendant. Filed in the U. S. District Court for the Eastern District of Washington. September 4, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.

[33]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Statement of Facts.

BE IT REMEMBERED that the above-entitled cause came on regularly for hearing in the above-entitled court on June 7th, 1915, before the Honorable FRANK H. RUDKIN, Judge presiding; the plaintiff being represented by Turner & Geraghty, and the defendant being represented by Post, Avery & Higgins. Counsel for both sides announced themselves ready for trial.

[Testimony of A. T. West, for Plaintiff.]

A. T. WEST, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

My name is A. T. West. I am president of the Davenport Independent Telephone Company; was president at the time letter set out in the bill of complaint was addressed to me by Mr. McFarland. Mr. McFarland knew my relation to the Davenport Independent Telephone Company at that time. He signed that letter as president of The Pacific Tele-

(Testimony of A. T. West.)

phone and Telegraph Company. I have the minutes of the Davenport Independent Telephone Company showing my authorization to sign my letter dated August 10, 1914, and addressed to Mr. McFarland. The minutes of the Board of Trustees are dated June 4, 1914. They recite the offer of Mr. McFarland under date of May 20, 1914. The proceedings were had after the receipt of a letter from Mr. McFarland.

Mr. TURNER.—We offer this minute dated as of the 4th day of June, 1914. **[34]**

Mr. POST.—I object because it is immaterial, irrelevant and incompetent.

The WITNESS.—(Continuing.) I was present at that meeting. The resolutions were passed at that time. They are the entire minutes of the company kept from the date of its organization, approving its by-laws. I know that the meeting was held after the receipt of Mr. McFarland's letter. It would be difficult to say the exact date.

Mr. TURNER.—I offer this.

Mr. POST.—I have offered my objections.

The COURT.—It will be admitted.

Mr. TURNER.—(Reading:) "The chair submitted an offer in writing under date of May 20th, 1914, from President McFarland on behalf of the Pacific Telephone and Telegraph Company to purchase the property of this company or such portion of it as they could lawfully acquire, saying therefor the appraised value of the plant as determined by the reproduction cost new, provided the acceptance

(Testimony of A. T. West.)

of the offer be filed with them on or before sixty days from the date thereof ; Mr. Armin offered the following and moved its adoption: Resolved, that the offer by President McFarland on behalf of the Pacific Telephone and Telegraph Company be accepted and the president is hereby directed to make formal acceptance of same prior to the expiration of the sixty day limit and also arrange for the appraisal in accordance with the conditions set forth in the offer. Resolution adopted by the following vote: Ayes, Armin, Cornell, West; nays, none."

The WITNESS.—(Resuming.) The gentlemen named in the resolution are the trustees. There are two others, Mrs. West and Mrs. Armin. They were seldom present. The members of the board of trustees own all of the stock. Mr. Armin has Mrs. Armin's proxy, I have Mrs. West's. We three are the entire organization. Subsequent to the acceptance of Mr. McFarland's proposition, Mr. **[35]** Tinkham and myself made an appraisement and inventory of the property.

(The inventory was offered in evidence and objection was made because it was immaterial and unnecessary. It was marked Plaintiff's Exhibit #2, and showed that the total appraisement was $34,623.00.)

The WITNESS.—(Resuming.) The inventory embraces the exchange at Davenport of the Davenport Independent Telephone Company, including poles, lines and wires about the city, together with all office equipment, switchboard, power plant and

(Testimony of A. T. West.)

such appliances as are usual and customary in the operation of a telephone plant, also suburban line built in the country adjacent to Davenport and connected with the Davenport exchange, also toll line from Davenport to the city limits of Spokane, also supplies such as construction materials that were actually on hand, and a part of the property of the Davenport Company at the time of making the inventory and appraisal. It includes no mention of franchises, good will or other property than the property of the company. It includes only the physical property. The property is situated at Davenport in Lincoln County, except two or three hundred poles that are in the woods in Stevens County, and except that part of the toll line in Spokane County. The poles in Stevens County were no part of the system. I was in possession of and maintaining a telephone exchange at Davenport at that time. The appurtenances of the telephone exchange were telephones, lines, switchboard, battery equipment. There was nothing attached to realty excepting the house in which we managed the exchange and the poles that were set throughout the city.

(Certified copy of Odinance No. 147 of the City of Davenport, having attached thereto the following resolution of the city council of Davenport, was admitted as Plaintiff's Exhibit #3, as follows:

[Plaintiff's Exhibit No. 3—(Part of) Resolution of City Council of Davenport.]

"Be it resolved that the transfer through mortgage foreclosure **[36]** and bills of sale running to Davenport Independent Telephone Company, a Washington corporation, of a franchise granted to the Local and Long Distance Telephone Company by the Davenport Council, Ordinance No. 147 is hereby ratified and approved. Passed at a regular meeting November 5, 1914, on motion of Mr. Denson, seconded by Mr. Chilton.")

Mr. TURNER.—I understood from you the other day, Mr. West, and wish you to state to the Court whether it is true or not, before you got the council to pass this resolution, you submitted it to Mr. Post to satisfy his desire that your company should be invested with a franchise for a telephone exchange.

Mr. POST.—He has two questions in one, and part of it is objectionable.

Mr. TURNER.—Before you presented this last resolution to the council at Davenport, did you submit it to Mr. Post to see whether it was satisfactory to him, and did he say it was satisfactory?

A. Yes, sir.

(A bill of sale from H. H. Reynolds to Washington Consolidated Telephone & Telegraph Company, No. 94,848, dated May 8, 1911, was admitted as Plaintiff's Exhibit #4. This was read into the record. This purports to convey all the property and assets belonging to H. H. Reynolds in the Counties of Lincoln, Grant and Spokane, together with all the appliances, franchises, contracts and agree-

ments of every kind and nature, including the contract with the Interstate Telephone Company, the agreement with the Gunning line and Reardan, franchises to the Davenport and Wilbur exchanges in Lincoln County, and Ephrata and Soap Lake in Grant County, and including all the poles, lines, wires and fixtures of every kind and nature and character in all of the counties aforesaid, exchanges and exchange apparatus and machinery in Mondovia, Davenport and Soap Lake and elsewhere, including the toll line from Davenport to Spokane, the toll line from Adrian to Ephrata and **[37]** anywhere else, and all materials, whether in use or otherwise, in said counties, and all lateral lines, supplies, materials and tools at Moran Prairie, Davenport, Reardan and Spokane.)

(The summons and complaint in the case in the Superior Court for the State of Washington, in and for the County of Spokane, entitled "The Washington Trust Company, a Corporation, vs. Local and Long Distance Telephone Company, a Corporation," were offered in evidence, and admitted as Plaintiff's Exhibit #5.)

The sheriff's return of sale of personal property under a mortgage foreclosure in the case last above mentioned was admitted in evidence as Plaintiff's Exhibit #6. This had attached to it an order of sale and decree in the mortgage foreclosure proceedings.

The findings of fact and conclusions of law in the same case were offered in evidence and marked

(Testimony of A. T. West.)

Plaintiff's Exhibit #7.

A bill of sale from W. B. Brockman, Sheriff of Lincoln County, Washington, for the consideration of $1,500.00 to the Washington Trust Company, was admitted and marked Plaintiff's Exhibit #8. This purported to convey all property of every nature, kind and description, and wheresoever situated, including real and personal, owned by the Local & Long Distance Telephone Company, a corporation, on May 24, 1910, or acquired by said company at any time after said date, and describes in detail the lines running through Lincoln, Grant and Spokane counties above set forth.

A bill of sale from the Washington Trust Company to C. N. Thomas, Trustee, was admitted and marked Plaintiff's Exhibit #9. This was for the consideration of $1,762.15, and purported to convey all right, title and interest of every nature, kind and description acquired by the first party to a certain bill of sale of W. B. Brockman, Sheriff of Lincoln County, conveying property described in sheriff's bill of sale.

A bill of sale from C. N. Thomas, trustee, to the Davenport Independent Telephone Company, dated August 11, 1913, was [38] admitted in evidence as Plaintiff's Exhibit #10, and purported to convey to the Davenport Independent Telephone Company the property described in the Sheriff's bill of sale above mentioned.)

The WITNESS.—(Resuming.) The bills of sale from the Washington Trust Company to C. N. Thomas

(Testimony of A. T. West.)

and from C. N. Thomas to the Davenport Independent Telephone Company were never placed on record; they were in the office of defendant's attorneys for three months. The bill of sale of Mr. Thomas to the Davenport Independent Telephone Company was negotiated by me. The signature on said bill of sale is that of Mr. Thomas. The Davenport Independent Telephone Company entered into possession of the property described in the bill of sale from Mr. Thomas. The property is embraced in contract of sale to the Pacific Telephone and Telegraph Company. All properties listed in the bill of sale were not appraised by Mr. Tinkham and me. The bills of sale covered more property than was found. I never took possession of any property in Grant County. That constituted no part of the property of the Davenport Independent Telephone Company.

Mr. TURNER.—I offer in evidence the franchise granted by the Board of County Commissioners of Lincoln County to the Washington Consolidated Telephone & Telegraph Company, covering all of the streets and roads of Lincoln County, not including the City of Davenport, over which this plaintiff corporation maintained its lines.

Mr. POST.—I object to this for the reason that under the record submitted by Senator Turner of this foreclosure proceeding, there has been no compliance with the law as to the filing of the franchise. They have to give different notice under the statute, and there is no proof here that such notice was given.

(Testimony of A. T. West.)

(The franchise was marked Plaintiff's Exhibit #11, but the court did not pass upon the admissibility.)

The WITNESS.—(Resuming.) The personal property specified **[39]** in the complaint in this case was acquired in the foreclosure proceedings from the Local & Long Distance Telephone Company. Personal property was in possession of my company from that time until now. It was listed in the inventory taken by me and Mr. Tinkham.

Mr. TURNER.—I want to offer the petition in bankruptcy in this case, the adjudication of bankruptcy and order of sale.

The COURT.—Who was the bankrupt in that case?

Mr. TURNER.—The Washington Consolidated Telephone and Telegraph Company.

The COURT.—That was the defendant in the foreclosure, also, was it?

Mr. TURNER.—Yes. I do not suppose it is necessary to read this.

The COURT.—I presume the whole thing may be considered in evidence and the parties can use such parts as they desire.

Mr. TURNER.—We offer those particular parts of this record for the inspection of the Court. We now offer the bill of sale from the trustee in bankruptcy to W. W. Smith, purchaser.

Mr. POST.—Who was the trustee in bankruptcy?

The WITNESS.—A. T. West.

Mr. TURNER.—We offer a bill of sale from Smith,

(Testimony of A. T. West.)
the purchaser, to the Davenport Independent Telephone Company.

Mr. POST.—Kindly give us the date of the bill of sale from West to Smith.

Mr. TURNER.—The 12th day of May, 1913, and the bill of sale to the Davenport Independent Telephone Company was the 1st day of June, 1914.

(The referee's record in bankruptcy was not marked as an exhibit, but the bill of sale from the trustee in bankruptcy to Smith was marked Plaintiff's Exhibit #12, and the bill of sale from W. W. Smith to Davenport Independent Telephone Company was marked Plaintiff's Exhibit #13.) **[40]**

The WITNESS.—(Resuming.) The particular property turned over under the bill of sale from the trustee in bankruptcy consisted of a large quantity of supplies, chiefly of several hundred poles piled on the railroad right-of-way near the depot at Davenport, some construction hardware in the warehouse in the City of Davenport. The exact inventory shows in the inventory made by Mr. Tinkham and myself. There was a line fifteen or sixteen miles north of Davenport together with additional poles and cross-arms distributed along the highways for the purpose of extending lines that had already been completed, and also a partially completed toll line from Sunset Boulevard to the city limits of Cheney; that was in Spokane County. All the other property was located in Lincoln County, with the exception of two or three hundred poles in the woods in Stevens County. These lines, with the exception

(Testimony of A. T. West.)

of the Cheney branch, are in Lincoln County, and north of Davenport. The property received by that bill of sale constituted the property belonging to the plaintiff here at the time of the receipt of the offer from the defendant and the acceptance of the same by the plaintiff. The company owns no property other than this telephone property.

Mr. TURNER.—It may be necessary to refer to other parts of this record.

The COURT.—The entire record will be in evidence for use as far as may be necessary.

Mr. TURNER.—And not to be included in any appellate proceedings unless all of it is really used.

The COURT.—Yes.

The WITNESS.—(Resuming.) Only two poles of our line were on any private property in the City of Davenport. Outside of Davenport, on the toll line between Davenport and Spokane, there are three instances where the line goes on private property, which came about through the road right-of-way being changed. The line [41] was originally built upon the highway, and when the road was changed, it threw the poles on privately owned property. In one place there are sixteen poles on the land. That would mean about half a mile. In another place there are six poles on privately owned land. In another place there are seven poles upon privately owned land. At one place north of Davenport the line goes across private land, and there are three or four poles there.

Mr. TURNER.—How much would it cost to

(Testimony of A. T. West.)
change these lines to make them run on the road as changed?

Mr. POST.—That is objected to as wholly immaterial.

The COURT.—I will receive it subject to your objection.

The WITNESS.—(Continuing.) In cases of the toll line, one hundred dollars would move the line to the road. In Davenport it would cost one hundred and fifty dollars to make the change. The line has been maintained there two and a half years and there has been no objection to it. As to the lines outside of Davenport, Mr. Todd objected; I gave him $5.00 and he was satisfied. No others objected. After the contract was entered into with the defendant, the defendant took several carloads of poles from Davenport and removed some from the extension between Sunset Boulevard and Cheney. I did not know anything about the poles being taken from the line between Sunset Boulevard and Cheney until after they had been taken. When Mr. Tinkham and myself were at Davenport looking over the property, he stated that he had occasion or would likely have occasion to use some of thase poles. They were 25-foot poles and his company does not use many of that length. And something was said with reference to whether or not I would have any objections to his using them. I said, no, they could take them at any time. The next I knew was that a young man came to Davenport to get a car or two of poles. He took at least a carload of the poles

(Testimony of A. T. West.)

and shipped them. Subsequently some letters passed between Mr. Tinkham and myself. Before the letters were [42] written, Mr. Tinkham explained to me that he had taken those poles on his own initiative, and he asked me if I would give him a letter indicating that in the event that for any reason this contract was not consummated, he could simply be held for the price of the poles. I told him I would do that. After the letters came I did not answer right away. Later I received a letter bearing the date of September 25th. That was the first letter. This correspondence took place after the young man got the poles. Tinkham called up and urged me to write a letter. I told him I would write such a letter, and I did. There was a second delivery after these letters. Mr. Tinkham stated that he wanted more poles from Davenport; that he had taken those from the road toward Cheney. I don't know just when those were taken, but the first information I had was when he announced the fact that he had taken them. They were gotten before the letters passed. He wanted me to include those in the letters, and I told him I was willing to do that with the provision that in addition I might, instead of taking an appraised price in case of settlement between him and me, that he would replace the poles if I so desired. I am now stating what was in the conversation. He called me up and told me he had taken the poles, and asked me to cover them in the letter the same way, and I told him I would do that excepting there was a little difference; I would

want to make a reservation that they were at my option to replace the poles set in the ground. I wrote a letter with that stipulation in it.

(A letter from Mr. McFarland, president, to Mr. West, dated December 15, 1914, was admitted in evidence as Plaintiff's Exhibit #14.)

Mr. TURNER.—I also have a letter from Mr. Kingbury, president of the American Telephone & Telegraph Company.

Mr. POST.—This letter refers to a letter received from Mr. West. Have you got a copy of that?

Mr. TURNER.—Yes, we have a copy of that and I will offer [43] the two in evidence.

Mr. POST.—If your Honor please, I object to correspondence between Mr. West and Kingsbury, who is not an officer in any way of the Pacific Telephone and Telegraph Company; he is vice-president of the American Telephone & Telegraph Company, but he is not an officer of the Pacific Telephone & Telegraph Company. I don't see how anything he wrote can be in any way binding upon the Pacific Telephone and Telegraph Company.

THE COURT.—In an equity case it can do no harm, but the court cannot take judicial notice of the relation of these different companies to each other.

(Mr. Turner then read into the record copy of letter from West to Kingsbury, dated December 6, 1914, and an original letter of Kingsbury to West, dated December 10, 1914. They are as follows:

[Letter, December 6, 1914, to Mr. Kingsbury.]

"530 Riverside Ave.,
Spokane, Washn., Dec. 6th, 1914.

Mr. Kingsbury, Vice-President,
American Telephone & Telegraph Co.,
New York City.

Dear Sir:

In an interview with Mr. McFarland and Mr. Pillsbury yesterday, they advised me they could see no way in which they could carry out the agreement entered into with me last June, as they feared violation of the anti-trust laws. Nor could they suggest any solution but stated they would give the matter some further consideration and advise me within two weeks of the result.

You no doubt recall the circumstances under which the agreement was made and that by reason of these circumstances and the nature of the business at hand it was left largely in the nature of a gentlemen's agreement, with your assurances that it would be carried out. I recall you asked to be advised in the event of difficulty being experienced in closing up the matter and I trust you may now be able to suggest a satisfactory solution.

I enclose herewith a copy of the letter of June 20 last by Mr. McFarland upon the subject. Due written notice was given as specified of the desire of the Davenport Co. to sell its property and an appraisement was made as provided and the value fixed at $34,623.00, which is set forth in a statement dated October 5th, 1914, signed by H. J. Tinkham on behalf

of the Pacific Co. and myself representing the Davenport Co.

I could and would if desired continue to operate the toll line independent of the exchange by establishing a toll station at Davenport or it could be left connected with the exchange and permit [44] the public to state what connection they wished, but the most rational plan and the natural solution is this. The management of the other exchange in Davenport has for some time wanted and sought connection with my toll lines. I have, as I stated to you in person, up to this time declined to establish the connection although he is in a position to divert considerable business to our lines. I now propose to establish this connection consequently if you purchase our exchange and even though you were to take your toll lines out of the other exchange in Davenport no competition would be destroyed but the conditions of operation would simply be reversed. Your lines could be run into our present exchange which you would purchase and the other exchange would get connection over the independent system. The difference would be that your lines would terminate in your own exchange and you would be in a position to handle your own business and not be subject to the arbitrary actions of your present sublicensee there. There would of course be nothing to prevent your giving him also connection with your lines if you saw fit.

I trust you may look favorably upon this plan, or devise a better one, your people have exhibited considerable ingenuity in the past, and can undoubtedly

pilot this through a safe course if it is desired to do so.

Yours very truly.

Copy to Mr. Kingsbury."

[Letter, December 10, 1914, N. C. Kingsbury to A. T. West.]

"AMERICAN TELEPHONE AND TELEGRAPH COMPANY.

15 Dey Street.

New York, December 10, 1914.

N. C. Kingsbury,
Vice-president.

Mr. A. T. West,
530 Riverside Avenue,
Spokane, Wash.

My dear Sir:

Your favor of the 6th instant is received, together with a copy of a letter to you from Mr. McFarland dated June 20, 1914, and a copy of a letter from you to Mr. McFarland dated December 6, 1914. I remember very well meeting you in Spokane and recall the fact that some negotiations were in progress between you and the officials of the Pacific Company. I was never advised as to the nature of those negotiations, nor did I know any definite agreement had been entered into between your company and the Pacific Company.

I have not heard from Mr. McFarland in regard to the matter, and I feel very certain that any agreement which he made and which can be legally carried out will be.

We are under commitment to the Department of

(Testimony of A. T. West.)

Justice in Washington in regard to the purchasing of independent properties, and we must not break our commitment. In some respects it is probable that we have promised to abide by the wishes of the Department of Justice in matters which might not be, strictly speaking, illegal; but whether a certain transaction would be considered legal or illegal would not influence us so far as the carrying out of our commitment is concerned. That we must do in all cases. [45]

Now, I am not sufficiently acquainted with local conditions to intelligently pass upon the matter in hand, and would much prefer not to do so, as we leave all such matters to our local people. I will, however, communicate with Mr. McFarland with regard to the matter, and I trust something may work out which will be not only entirely all right under the law and under our commitment, but mutually satisfactory.

Yours very truly,
(Signed) N. C. KINGSBURY,
Vice-president.")

The WITNESS. — (Continuing.) I have refreshed my recollection since adjournment concerning the minutes of our company under which I was authorized to accept this proposition. The record of our minutes shows the meeting as of June 4th in this way. The regular meeting of the board of trustees is scheduled for the first Monday in each month, and many times when it is thought that another meeting would be desired, the meetings are adjourned from time to time. I took care of the cleri-

(Testimony of A. T. West.)

cal work, and the regular meeting of June the 4th, Monday, was adjourned until June 30th, for the reason that Mr. Armin, who is secretary, and one of the directors, was soon to leave. He left Spokane for the east on July 1st, and it was the day before he left that this adjourned meeting was held in which I made a note of the fact that this offer of Mr. McFarland's was reported and acted upon. I was able to refresh my recollection because it was the day before Mr. Armin left for the east. I did not know what time he left, and I have since seen him and he made a note of it in this note-book on the day on which he started for the east. My notes of the meeting were erroneously written up as the meeting of June 4th, and since Mr. McFarland's letter was written June 20th, and without referring to that, I assumed it must be May 20th. As a matter of fact, that was an adjourned meeting that should have been written up that the meeting was adjourned to the 30th, just before he went. It was after this letter was received and talked over, and on a clerical error, I wrote the meeting as the 4th, when it was an adjourned meeting instead. My recollection has been refreshed in this mattter. [46]

Cross-examination by Mr. POST.

We have no secretary's book of the Davenport Company. I was largely instrumental in getting up the Davenport Independent Company. It was organized in 1913. The first meeting was held August 11, 1913. There have been several meetings since then. I did not change these minutes to-day. The

(Testimony of A. T. West.)

secretary's book shows for itself what meetings were held since August 11, 1913. The minutes on June 30, 1914, were written by me. I do not recall whether I did this in 1914 or 1915. I think it was in 1915. I do not remember how long ago. I do not remember whether I wrote the minutes within the last two weeks or not. A person is apt to make mistakes when they do not have a record of things. It was comparatively recent. Within the last few weeks I got up the minutes dated June 4, 1914, from notes made at that time. When the minutes were written, the notes were destroyed. At the time I got up the minutes I was advised when the contract was made, and I fixed the date of the first letter May 20, 1914. Something like ten months elapsed before the minutes were written up and signed by anybody as secretary. Not all of the other minutes were gottetn up recently.

Q. As a matter of fact, you did not hold any meeting in June, 1914, at which any trustees were present, but this is an effort to get up some minutes for the purpose of this lawsuit, isn't it? A. No, sir.

Q. Have you got here the minutes of stockholders' meetings at which the board of trustees were elected?

A. Yes, sir.

The WITNESS.—(Continuing.) This was held on January 5, 1914, and at that meeting the people elected as trustees were A. T. West, C. E. West, L. B. Cornell, W. H. Armin, E. P. Arnold. It is not correct that the company was doing a profitable business. It was in debt three thousand dollars. There

(Testimony of A. T. West.)

had been a satisfactory [47] growth of business. Numerous extensions had been made out of the earnings. The company was entirely solvent. There were seven or eight stockholders present June 1st. On June 30th there were five stockholders. We do not have any stock book here. On January 5, 1914, there were only seven or eight stockholders. There were the two Wests, the two Armins and L. B. Cornell; and amount of stock 200.25 present, and absent 49.75. Those were held by W. W. Smith and C. N. Thomas. At the meetings in June, Smith and Thomas had sold their stock to me. The meeting of January, 1915, was not written up. There was a meeting in January, 1915, for the purpose of electing a board of trustees.

Q. In relation to this transaction with the Pacific Company, what business was transacted?

A. Well, there was in this way. To make definitely certain that everything prior to that time was ratified, that is, everything that—everything had been done in connection with this up to this time had been ratified, and—

Q. When are you going to write up those minutes?

A. Whenever we take a notion.

The WITNESS.—(Continuing.) We held a meeting of the board of trustees June 4, 1914, and the minutes are different from those set out in that we adjourned to June 30th. We adjourned from June 4th to June 30th for the reason we knew Mr. Armin was going away, and he was going to be gone for several months, and we adjourned to a period

(Testimony of A. T. West.)

just before he left so that we could handle any business that came up in the meantime. You will notice that the adjourned meeting we adjourned till August, skipping the July meeting because we knew he would not be there. No notice was given to the board of trustees of this meeting held either on June 4th or June 30th. Three trustees were present.

Q. And there was no stockholders' meeting there with reference to this matter? [48]

A. It was referred to in the last stockholders' meeting.

Q. I mean so far as the minutes are concerned.

A. There is something in the minutes of the stockholders' meeting before that, if you will read it.

Q. Find where there is any reference to it, the stockholders' meeting.

A. It doesn't refer specifically to this matter, but we had another matter up covering the same thing.

Q. What date is that? A. January 5, 1914.

Q. I am talking about since you have had some dealings with Mr. McFarland.

The COURT.—Is there anything with relation to this contract in the stockholders' meeting?

The WITNESS.—No, but empowering the president to make such contract.

Mr. POST.—Q. All right, you read any minutes of January 4, 1914, that empower the president to sell all the property of the corporation, or whatever minutes you have referred to; just read it so we will get it.

The WITNESS.—A. Well, "Whereas there ap-

(Testimony of A. T. West.)

pears a possibility of forming a desirable consolidation with other operating telephone companies, or the possibility of making a profitable lease or outright sale of the company's property, resolved that the trustees be and hereby are authorized to enter into such negotiations or to delegate such officer or officers as they see fit with full authority to sell or lease the property of the company.'' The resolution was adopted by the affirmative vote of all stockholders present.

Mr. TURNER.—When was that?

A. January 5th.

The WITNESS.—(Continuing.) At that meeting 200 shares [49] were present. 350 shares had been issued. The inventory covers the pole line to Cheney; it does not cover the Reardan property. The company did not claim to own anything at Reardan. We claimed to own the exchange at Davenport and some rural lines running to communities that could hardly be called towns; one was Egypt. One pole line ran past Reardan, giving service at Reardan, and running to the city limits of Spokane. At Spokane it connected with the Home telephone line. It was so connected that one could talk from Davenport to Coeur d'Alene, Idaho; that was being done back and forth. The Davenport Company was doing an interstate business with northern Idaho to a limited extent. I did not submit any franchise or any copies of franchises to the county commissioners of either Spokane or Lincoln County to you. You tried to get me to tell what I claimed in the way

(Testimony of A. T. West.)

of franchises out in the country, and I did not do it. I told you we did not sell any franchises. I didn't know whether there were any franchises or not. If I had a franchise in Davenport, it runs to the Local & Long Distance Telephone Company, and you pointed out to me that a certain statute was different from the ordinary foreclosure statute about giving notice of sale under a decree. You pointed out that the statute had not been complied with and that I did not have a franchise in Davenport, in your opinion. You asked me if there was not some officials of the Local & Long Distance Telephone Company who could sign an assignment of that franchise when we were looking up the title. I think I told you that the company was in such a condition that I could not find anybody to sign it. We talked about fixing an assignment of the franchise, or that the city council might pass a resolution recognizing in some way the assignment. You were busy and I said I could draw it up, which I did. You looked it over and said, "I think that will fix it all right." I went down to get it passed and brought back a certified copy. I don't know that you said the resolution would constitute an assignment, but I gathered that [50] inference. You said if anything in the world would fix it up so that I could get an assignment, it would be something like that. You did not tell me it would constitute an assignment that would give a good franchise, but that it was the best that could be done under the circumstances. One of the bills of sale is signed by C. N. Thomas, trustee. He was

(Testimony of A. T. West.)

trustee for me, himself, and Mr. Armin. The pole line to Cheney is about fifteen miles long. No wires have ever been strung on those poles. The poles were erected in 1909, practically to Cheney. It met the other line about five miles west of Spokane. I was trustee in bankruptcy for the Washington Consolidated Telephone Company. Smith never had any association with me. When we bought the property, we gave Smith some stock in the Davenport Independent Telephone Company for it. We gave him stock on the date he gave a bill of sale to us; that was May 27th. The stock was issued on May 27th, 1914. At the meeting of January, 1914, Smith owned more than half of the absent stock. I think he acquired stock before January 1, 1914.

Q. Then he didn't acquire this stock on May 26, 1914?

A. I don't remember—I can't remember those various stock transactions.

Q. Judge Turner says the stockholders' meeting was in 1915, isn't that so?

A. Certainly, that was 1914.

The WITNESS.—(Continuing.) The stock-book will speak for itself as to when we got the stock. I was laboring under a misapprehension that Thomas and Smith owned them at the time, but it is possible they did not. The only thing we do know is who the people were who were present at that meeting. When I was trustee in bankruptcy, I did not sell the property to Smith upon the understanding that Smith would turn it over to my company; he was not

(Testimony of A. T. West.)

a stockholder at the time of the sale; that is clear to me; there may be some discrepancy in dates, or something like that. The stock [51] may have been issued before it was delivered to him. I as trustee in bankruptcy sold to Smith May 12th. Smith lived in Vermont; he was not here then; he was represented by O. B. Setters, the lawyer. We bought from Smith June 1st. I had no communication with Smith during that time.

The WITNESS.—A. Smith came to me long before this got into the Federal Court in bankruptcy and wanted to sell his property, and I looked into the thing a little.

Mr. POST.—What property did he have?

A. He had the old Washington Consolidated property. He was the heaviest stockholder in it. We looked into the situation and said, "You haven't got anything to sell because it is all burned up and balled up," and—you see in the meantime this petition had been filed asking that the company be declared a bankrupt. Smith at that time was trying his best to save it from going bankrupt. He came out here and took assignment of eight or ten thousand dollars worth of these claims; didn't pay them but gave the man his money on the most favorable terms he could get and took an assignment of the claim to himself; he felt he had the whole thing but he didn't have any actual interest; we were operating up there in Davenport immediately adjacent to his property, his lines coming into our property, and he wanted to make some arrangement with us. He consulted with

(Testimony of A. T. West.)

our attorney and found the best thing he could do was to go ahead and have it declared bankrupt and the property sold, and he was going to undertake to buy it in. I was made trustee largely for the reason the properties were adjacent to the property I was operating and I was in a position to look after it without any particular expense and it would not impair the value of the property by disrupting the service that was being given over the lines of the company, and when that was ordered sold, I communicated as trustee with your company and asked if you wanted to put in a bid on it and to the city and town telephone companies asking them [52] to bid on it and both companies answered they didn't care to bid on it; Mr. Smith was in a position to bid more than anybody else did because the big majority of it would come to him anyway. He was considerably the greatest creditor. He bought that in and after that he was perfectly free to do with it as he pleased; he still wanted to sell to us and I was approached several times, and finally I told him I would give them stock for it; Mr. Setters—he communicated with Mr. Smith, I presume, and accepted the proposition. I then gave Smith stock and he transferred the property to the company. I haven't a doubt but what he tried to sell everybody else within the limited time he had.

The WITNESS.—(Continuing.) The line I refer to as operating was the old Local & Long Distance telephone line, which would be the Davenport exchange, and the Spokane toll line and some sub-

(Testimony of A. T West.)

urban lines. The other property under the bankruptcy sale was a lot of supplies and twenty-two miles of pole line that was being operated in connection with my exchange. I told Smith when he offered to sell before bankruptcy, he didn't have any title to sell it; that the only thing he could do was to get title and then he would be ready to do business. I was trustee in bankruptcy and sold to Smith and he sold back to my company. We gave him $8,500.00 in stock, par value. He paid $2,100.00 in bankruptcy for the property. This stock given Smith was not treasury stock. All the stock of the company had been issued prior to that time, and those who had stock paired it off pro rata. O. B. Setters was attorney for me as trustee in bankruptcy. He had been attorney for Smith. In the bankruptcy proceedings is an appraisement and inventory of the property, which describes 12–¾ miles of line under construction. This began at the city limits of Davenport and extended north. It passed through Egypt, a place consisting of two stores and a post-office. There is also an item of ten miles of line semi-standard. This is a branch of the other line about five miles north of [53] Davenport. These lines were not completed to the point they intended to serve.

(The stock-book was then produced, and showed that Mr. Smith's stock was issued on the 27th of May for 20 shares; 1 share to Setters, 43 shares to Smith on May 27th, 133½ shares on the 27th to West, and 21 shares to Smith on the 27th, 84 shares to Smith and 1 share to Setters on May 27, 1914.)

(Testimony of A. T. West.)

The WITNESS.—(Continuing.) That was fifteen days after I sold this property as trustee in bankruptcy. If I said that 149 shares of stock belonging to Smith and Thomas were not represented at the meeting on June 1, 1914, that was probably a mistake.

The COURT.—How many shares altogether?

Mr. POST.—350.

The WITNESS.—Well, now, there is West 1 share, L. B. Cornell 1 share, C. N. Thomas 64.75 shares, E. P. Armin 1 share, W. H. Armin 63.75; that was not issued until May.

The COURT.—How can you tell whether they are outstanding or cancelled?

A. At that time Mr. Armin held 85.75 shares.

The COURT.—Mr. Thomas held the same?

A. Mr. Thomas held the same

The WITNESS.—(Continuing.) C. E. West held 1 share, L. B. Cornell 1 share, A. T. West 176½ shares, C. N. Thomas 1 share. I think that was out at that time. 6475 to Thomas again; E. P. Armin 1 share. That ought to come out 350.

The first letter I got from Mr. Tinkham relative to poles or the taking of any property was dated October 30, 1914. There was a letter that bears date of September 25th, but that did not reach me until after October 30th. When I received it, I remember I noted the difference in time and put a note on the letter at the time. In the meantime I had seen Mr. Tinkham. He said he had sent me a letter and asked if I had got it. I told him no. I [54] told him at that time I did not receive it, and he said he misdi-

(Testimony of A. T. West.)

rected it in care of the other taxicab company, because our office was with the 77 Company.

(The letter of September 25, 1914, was read into the record, and is as follows:

[Letter, September 25, 1914, H. J. Tinkham to A. T. West.]

"Mr. A. T. West, President,
Davenport Independent Telephone Company,
Davenport, Washington.

Dear Sir:

In confirmation of our conversation I am arranging to take from your stock of poles at Davenport fifty 20-foot "E" poles, and will load up the remainder of the car with 25-foot "B" poles. The understanding is these poles will be paid for at the fair market price of poles of this class, f. o. b. Davenport. Please write me advice of your acceptance.

Yours truly,
(Signed) H. J. TINKHAM,
Division Superintendent of Plant.")

The WITNESS.—(Continuing.) At that time we had a large amount of supplies on hand running to an amount of five or six thousand dollars, consisting of a large number of poles and other stuff that we had no use for unless we continued as originally planned to carry out the construction we had in mind. As originally planned, the people who started the system intended to build a large independent system, When we bought the poles and other stuff, it was in our minds to extend the lines to Miles, Lincoln, Fruitland and Hunters. These are towns in Lincoln County, except Fruitland and Hunters, which are in

(Testimony of A. T. West.)

Stevens County. We also expected to complete the line to Cheney.

Referring to the expression in the letter of September 25th, "in confirmation of our conversation I am arranging to take from your stock," I will say that I had some conversation with Tinkham about his taking some of these poles and using them before the attorney for the Pacific Company had passed upon the title, or before the matter had been definitely settled. I do not know when any of this material was taken or when the first was taken. [55] The next letter I had from Mr. Tinkham was dated October 30th.

(This letter was read into the record and is as follows:

[Letter, October 30, 1914, H. J. Tinkham to A. T. West.]

"Spokane, Wash., October 30, 1914.

Mr. A. T. West:'

On the above-mentioned estimate—"Well, up in the corner there is an estimate 2081—" On the above-mentioned estimate we are going to use the 425 25-foot poles which are now standing along the county road between Sunset Boulevard and Cheney, but in addition to these we will require 17 20-foot poles, class "B," and 236 25-foot poles. Will you kindly advise if you have the character of poles wanted at Davenport, and when you can make shipment of the same to Spokane?

Yours truly,

(Signed) H. J. TINKHAM.")

(Testimony of A. T. West.)

The WITNESS.—(Continuing.) I answered that letter verbally, and soon after I received another letter dated October 31st, which is as follows: "Davenport Independent Telephone Company, Spokane. October 31, 1914. Mr. A. T. West: Concerning our understanding relative to the purchase of poles from stock at Davenport, and also removal and use of poles between the State road and Cheney, will you kindly confirm our understanding if this will be satisfactory to you? The understanding is that in the event that the sale of supplies and plant as agreed upon originally between this company and you is not for some reason carried out that we will pay you for the poles we have taken from stock a fair market price, and we will pay you for the poles between Cheney and the State road a price equal to the reproduction cost new of same, the estimated cost being as agreed upon in the original inventory. Will you kindly acknowledge this understanding? Very truly yours, H. J. Tinkham, Division Superintendent of Plant." I answered that letter as follows: "Spokane, Washington, November 5, 1914. H. J. Tinkham, Division Superintendent of Plant, Pacific Telephone and Telegraph Company. Referring to your letter of the 31st ult., the arrangement outlined is entirely satisfactory so far as it refers to the poles taken or to be taken from the yard at Davenport, but in reference to the poles between Cheney and the State road, I should like the option of [56] requiring you to replace with new poles of this same class and fitted with the same character of fixtures, etc., such poles as

(Testimony of A. T. West.)

you remove, in the event the general sale of the plant and supplies now pending should not be consummated. With this understanding, there is no objection to your removing the poles as required. Yours truly, Davenport Independent Telephone Company, by A. T. West."

Redirect Examination by Mr. TURNER.

Referring to our business with northern Idaho, I will say that the business was done in this way: In case a subscriber would want a connection in Coeur d'Alene, we would place a call with the Home Telephone Company in Spokane, and ask them to give us that connection. They would put up the connection through our switchboard and the subscriber would converse. I tried several times to get the Home Telephone Company to recognize the contract between the Washington Consolidated Telephone Company and the Home Telephone Company and the Interstate Telephone Company, Limited. They did not do so. The interstate business I did through them was merely a matter of accommodation from time to time. During a period of over twenty-two months, our total interstate business averaged forty-two cents a month outgoing, and seventy cents incoming, or a total of one hundred twelve cents a month.

The conversation mentioned in the letter by Mr. Tinkham dated September 25th, was a conversation I had with Tinkham when making the inventory, and he said he would like to take some of the poles. He had a place to use them, but at the time I got the letter the poles had been taken and used. As to

(Testimony of A. T. West.)

whether or not the poles had been taken before the letter passed between Tinkham and me, I will say that I do not know the date the poles were taken. At the time I talked to Mr. Post, I did not have an attorney. I had not been advised as to my rights. Mr. Post told me there was no question but what the contract was invalid as against the anti-trust laws of the United States. [57]

Q. Told you there was no doubt it constituted no contract because there was no consideration?

A. Yes, sir.

Mr. POST.—That is objected to as wholly immaterial and not redirect examination.

The COURT.—The questions are rather leading.

Mr. TURNER.—Did he, or not, state to you this did not constitute a contract on the general principles of law?

Mr. POST.—Objected to as being wholly immaterial.

A. He stated that in very emphatic terms.

Q. Intimating to you, you were liable to go to jail?

A. Oh, yes; and other things of that character.

Recross-examination by Mr. POST.

Mr. Post never said that the contract was a lobbying contract or that the consideration was for lobbying, and it was an inequitable and unjust contract, and unenforceable.

Q. You wrote a letter that your counsel has read in evidence here to a gentleman in New York by the name of Kingsbury, in which you stated this was a gentlemen's agreement. What do you mean by that

(Testimony of A. T. West.)

expression in that letter, by a "gentlemen's agreement," is that an agreement that is invalid in court in order to enforce some contract in violation of law?

A. When that letter was first given to me—

The COURT.—What do you mean by that expression?

Mr. POST.—When you wrote this letter to Kingsbury, what did you mean by that expression, "gentlemen's agreement"?

A. That I might have some difficulty in enforcing it in court.

The WITNESS.—(Continuing.) I said that I struggled long and hard to get a contract with the Interstate Telephone Company, Limited, and the Home Telephone Company, for a connecting contract. The Home Telephone Company would give me the use of the exchange; a contract [58] with the Interstate Telephone Company, Limited, would have given me connection with the points they reached. The points they reached were in northern Idaho. I was eager to have a contract with the Interstate Telephone Company, Limited, to do interstate business and to get into Spokane. The Interstate Company also did business in Washington. One place was at Mount Hope, another was Garfield, another was Palouse. We reached them over Interstate lines. The Interstate did not have lines to Garfield; there was another independent company that connected with the Interstate like mine, and it ran to Garfield. The same is true about Palouse.

Q. Were you so eager to get this contract with the

(Testimony of A. T. West.)

Interstate Telephone Company, Limited, in order to do business with Mount Hope, Garfield and Palouse, or was it in order to do business with Coeur d'Alene Wallace and Post Falls and towns in northern Idaho? A. May I state here—

Q. Please answer the question.

A. All the points, of course.

Q. That is, you were anxious to do an interstate business with northern Idaho?

A. I didn't want any connection we had enjoyed in the past disrupted.

Q. You thought that was an important part of your business?

Mr. TURNER.—We will admit that.

Mr. POST.—Well, it is admitted that was an important part of your business, the interstate business with northern Idaho. Do you admit an important part of the business of the Davenport Independent Telephone Company was interstate business with northern Idaho.

Mr. TURNER.—I admit the amount done about twenty-two dollars per year.

The COURT.—It was admitted they were doing some interstate [59] business. I don't think the extent of the business would make any difference with the Sherman Act.

The WITNESS.—(Continuing.) I conferred with Mr. Lane in order to get the Interstate contract. I saw Lane two or three times; the first time was soon after I acquired the property, and I saw him again a few months before it was generally known that there

(Testimony of A. T. West.)

was to be a consolidation here. My connection with Lane was never severed.

Q. Was it continued?

A. With the exception of this extent; with reference to the contract, whether it had been interrupted or not, during the early process of this operation, any business we got from points in Idaho we got the connection through the Home and Interstate for that business and under the old arrangement, any business that was originated in the territory of northern Idaho with the operating company up there in connection with this system was delivered to Davenport and Reardan and the points we reached over our line, and we got a mileage on that; it wasn't much, because that was considered in our statement of revenue as long distance business, but by reason of this consolidation that took place in northern Idaho, that very feature of interstate business was taken away from us, because under the terms of the contract which your company has made with the Interstate which you also owned at one time with any business out of that section of the country, that business comes over the lines of the Pacific Company now; to that extent it had been interrupted.

The COURT.—Is the question the amount of business done or the amount of business tried to be done?

Mr. POST.—The amount of business that might have been done that we might be interfering with if we carried out this agreement.

The WITNESS.—(Continuing.) Prior to January 20, 1914, we were not physically connected with the

(Testimony of A. T. West.)

Interstate, but we got connection through and each month we did some interstate business. We [60] were connected in the usual way. I know of the existence of a contract between the Interstate Telephone Company, Limited, and the Local & Long Distance Telephone Company. I saw it in the files of the telephone company. I also saw one with the Washington Consolidated Telephone Company, which was supposed to supersede the other. That is the one I have reference to. I did not know of the decree of foreclosure mentioned in the contract. I saw the contract with the Washington Consolidated Telephone Company in the office of the Home Telephone Company about two and a half years ago, after I claimed to have purchased the property in question. I went in to see the contract. The vice-president showed it to me. I asked for a copy of the contract, but he did not give it to me. I never saw the contract but once. I think it was just an ordinary connecting contract. It was repudiated so far as I was concerned by Mr. Lane both times I went to see him about it. Barring wire trouble, there never was a time when a customer at Davenport could not talk over my line and through the Home and Interstate Companies to northern Idaho. The same was true the other way, that is, from Idaho to Davenport. The Bell Company had a toll line in northern Idaho in the same territory; it also had an exchange in Spokane, and it extended to the city limits of Davenport and there connected with an exchange operated by Mr. Hanson.

(Testimony of A. T. West.)

Redirect Examination by Mr. TURNER.

On June 20, 1914, at the time the contract in suit was made, the Bell interests owned both the Home and the Interstate.

Recross-examination by Mr. POST.

I know a good deal about that. Before June 20, 1914, the Bell interests owned control in some of the stock, and before June 20, 1914, a decree had been entered at Portland in the Federal Court, requiring them to dispose of their interest. I knew of the decree when the letter dated June 20th was written.

(The decree in the case of United States of America vs. [61] American Telephone Company, Pacific Telephone & Telegraph Company, and others, was marked Defendant's Exhibit #20, and admitted in evidence.)

(At this time plaintiff offered in evidence a resolution of the Board of County Commissioners of Lincoln County, Washington, which is marked exhibit #15, over objection of the defendant that the same is immaterial; that the Board of County Commissioners is a body of limited jurisdiction, and that in order for the Board of County Commissioners to do anything, public notice should be given under the statute.)

[Testimony of W. H. Armin, for Plaintiff.]

W. H. ARMIN was called as a witness on behalf of the plaintiff, and testified as follows:

Direct Examination by Mr. TURNER.

In June, 1914, I was secretary of the Davenport Independent Telephone Company. I think

(Testimony of W. H. Armin.)

that a meeting of the board of trustees was held on June 4, 1914, and a resolution was passed authorizing the president to accept the offer of Mr. McFarland, president of the Pacific Company. This was an adjourned meeting. By that I mean we had a meeting earlier in the month,—a month earlier than June 4th, or something like that. The letter of Mr. McFarland was dated June 20th. I remember the date I went away for the summer. The meeting was held the day before I went away. I went away on July 1st, so the meeting was held on June 30th. That was the adjourned meeting from June 4th. My attention was called to this discrepancy in dates this afternoon.

Cross-examination by Mr. POST.

My business is that of mortgages, loans and real estate in Spokane. I have given some attention to telephone business. I have 63 and a fraction shares of the telephone stock. We had a meeting of the stockholders in January, 1915. I believe we had two other meetings, but they were not formal. I can't remember [62] the date or the month of those meetings. I remember the annual meeting of the stockholders in January. The board of trustees has been together a good many times. The office of the company is at the corner of Riverside and Wall in Spokane. I can't give any specific dates when we had a meeting of the board of trustees. In 1915 the board of trustees consulted on many points of business. I went to the central West in the summer of 1914, and was gone nearly four months. I remember

(Testimony of W. H. Armin.)

that we had a meeting the day before I left, because the fact I was going brought about the meeting. I am secretary of the company. Did not always write up the minutes of the meetings; just made pencil notes; do not recollect writing up the meeting had just before I left. When I didn't write up the minutes of the meetings, Mr. West did so. He was not the secretary; that was my business. I think there have been meetings in 1915 that have not been written up. We had a meeting on June 4, 1914. According to our by-laws, the regular meetings were held on the first Monday of each month. The first Monday in June 14, 1914, was on June 1st. The notes attached to the minutes shown me says: "Meeting Board of Trustees held June 4, 1914." I signed the minutes after I returned from the East. I can't tell the time when I signed them. I can't tell if I signed them within the last week or two. I signed some of them in the last week. I may have signed the minutes of June 4, 1914, within the last week. I can't answer that. It is my best recollection that I signed the minutes within the last week. I don't know where the minutes were written up. I suppose Mr. West did the typewriting.

Q. So it isn't true, is it, that there was any meeting held the 4th day of June?

A. I think it must have been the 1st according to the calendar.

Q. What was done at that meeting? [63]

A. I can't tell you.

Q. You don't remember anything about it.

(Testimony of W. H. Armin.)

A. I can't tell you.

Q. Was there any meeting held between the 4th day of June, 1914, and the 30th day of June, 1914?

A. Not what you would call a regular meeting; that is, I mean no formal meeting.

Q. Then you don't know what was done at the meeting of June 30th, either, do you?

A. I couldn't tell you those things without referring to them. I have too many of them to refer to.

Redirect Examination by Mr. TURNER.

I remember that at that meeting the following resolution was adopted: "Resolved that the offer made by President McFarland on behalf of the Pacific Telephone and Telegraph Company be accepted, and the president is hereby directed to make formal acceptance of the same prior to the expiration of the 60-day limit, also to arrange for the appraisal in accordance with the conditions set forth in the offer."

Recross-examination by Mr. POST.

I don't know whether the action on that resolution was June 1st or June 30th. Mr. West told me of the letter from Mr. McFarland. I don't think I saw it; it was in escrow or somewhere.

Plaintiff rested.

WHEREUPON the following testimony was offerred on behalf of the defendant.

[Testimony of H. J. Tinkham, for Defendant.]

H. J. TINKHAM was called and sworn on behalf of the defendant, and testified as follows:

Direct Examination by Mr. POST.

My name is H. J. Tinkham. I am Division Superintendent of Plant with the Pacific Telephone and Telegraph Company for [64] eastern Washington and northern Idaho.

Referring to a map marked exhibit #16, the witness said:

It is a map showing the routes of the toll lines in eastern Washington and northern Idaho belonging to the Pacific Telephone and Telegraph Company, to which has been added the colored lines of the Interstate Telephone Company, Limited, and the Davenport Independent Telephone Company and the Inland Telephone Company. The additions are in lines of red, green and yellow. With those lines off the map is a stock map of the Pacific toll lines. The red lines are the lines of the Interstate Telephone Company, Limited. There are no other companies in eastern Washington connected with the Interstate Telephone Company, Limited, except the Davenport and the Inland, that I know of. The Davenport line as claimed by Mr. West is shown on the map in yellow. There are two exchanges in the town of Davenport; one is run by a man named Hanson; I do not know the name of his company; he has some kind of arrangement with the Pacific Company whereby the toll lines of the Pacific Company are tied up to his exchange; that has been true for a great many years.

(Testimony of H. J. Tinkham.)

Hanson also connects with our line at Reardan. I am the man mentioned in the letters in evidence, which letters are between Mr. West and Tinkham. I did not take any of the property Mr. West claims before having an understanding with him either oral or in writing. The first load of poles was taken from Davenport on September 29, 1914. That lot was one carload, some twenty feet and some twenty-five feet long. The supplies on hand of the Davenport Company in the appraisement amount to about $4,749.38. The toll line plant figures at $6,145.00. The toll line at Cheney, $1,512.75; Davenport exchange plant, $21,215.42. The amount, $5,749.38, was greater than the ordinary amount of supplies on hand unless there was some unusual construction anticipated. The carload of poles taken in September with the carload taken November 9th amounted to $715.00. One carload would amount [65] to one-half of that sum. Before I took the first carload I told Mr. West that I was in need of some poles for our regular construction work, and asked him what position he would take in letting me have the poles. He said I could have them. I told him then that I would not take them unless I could make some arrangement with him whereby I could pay for the poles in the event the contract which I understood he had entered into with the Pacific Company did not go through. He said that was satisfactory, and if the sale was not consummated, I could pay him a fair market value for the poles. I did not take the poles as part performance of the contract. Besides the two carloads of poles,

(Testimony of H. J. Tinkham.)

we took some poles out of the lead that was extended between Sunset Boulevard and Cheney; that was a pole line about twelve miles long. Some of these poles had cross-arms on them, but there were no wires. We took 128 poles out of that lead. We did this because we were setting poles in that immediate vicinity and we needed poles of that height and class; that is, we wanted small poles about twenty-five feet high. My understanding with Mr. West about these poles was that in the event the sale to the company did not go through, I would replace the poles I did take down with poles of equal strength and character. At that time we had no poles of that character in that vicinity. The poles are referred to in the letter dated October 31, 1914. 128 poles would make about four miles of lead. This lead was about five years old. I had a conversation with Mr. West about taking the poles, about as follows: I told him that as far as the agreement he had entered into with the company was concerned, I was not familiar with the terms and conditions, and that I did not know anything about it; however, I was in need of poles and he had a large stock there, and if the company did take over this material later, we would have these poles on our hands, and I thought it would be a good idea to use them at this time; however, I told him, not being familiar with the [66] terms of the contract, that I could not purchase any poles under that contract, and that I would handle the matter as a separate proposition. I had nothing to do with the original contract with West. That was out of my jurisdiction.

(Testimony of H. J. Tinkham.)

(Exhibit #16, being the map above referred to, was admitted in evidence.)

Cross-examination by Mr. TURNER.

The first lot of 29 poles was taken by men under my supervision. I gave them directions to do this between September 25th and the 29th. My conversation with Mr. West antedated that direction by several weeks, or at the time the inventory was made. At that time I had no reason to believe that the contract between the company and West would or would not go through. My reason for writing after the poles were taken was that I wanted it in writing in order that it would be clearly understood what price I would have to pay for the poles in the event I was compelled to pay for them. The letters fixed the fair market value. I wanted to make it clear to Mr. West that I was making a separate deal with him about the purchase of the poles. I wanted Mr. West to confirm that fact, to make it clear to any one who might be interested in it, to my superiors in the company if they wanted to make an investigation of it. Another reason I sought the letters was that I think it is a habit followed by all business men. Whenever we buy poles from anybody, we ask them to submit in writing the price so there will be no misunderstanding afterwards. In this case I had a verbal understanding with Mr. West, and I had written a letter under date of September 25th confirming our understanding. The other letter was dated October 31st. I made numerous attempts to get a written understanding with Mr. West. I did not wait from

(Testimony of H. J. Tinkham.)

September 25th to October 31st. I personally asked Mr. West and had my wire chief call him. I asked him to put our understanding in writing. I told him my [67] understanding was that in the event of the sale not going through, we would pay him the fair market price for the poles we took. We reached that understanding at the time of the inventory and several times afterwards. I wrote the letter of October 31st pursuant to my policy of having everything in writing, and also because we were taking some poles along the road between Sunset Boulevard and Cheney. These poles were taken in the latter part of November, after Mr. West's reply to my letter of October 31st.

Redirect Examination by Mr. POST.

The value of the Cheney poles themselves amounted to about two hundred dollars. The reproduction cost would be about five hundred dollars.

[Testimony of Carrie Lester, for Defendant.]

CARRIE LESTER was called and sworn on behalf of the defendant, and testified as follows:

Direct Examination by Mr. POST.

My name is Carrie Lester. In 1914, I was head bookkeeper for the Interstate Consolidated Telephone Companies, which included the Interstate Telephone Company, Limited, of Spokane. I am now auditor of the Interstate Utilities Company, which is the same property under another name. I am familiar with the contracts made between the Washington Consolidated Telephone Company and

(Testimony of Carrie Lester.)
the Local & Long Distance Telephone Company and the Interstate Company. The contracts are a part of the files in our office.

(The contracts referred to were bound together in one bunch and admitted in evidence as Defendant's Exhibit #17.)

I have investigated the amount of toll business done over the line that runs out of Davenport and Reardan through the Interstate Limited Company to points outside of Washington for the six months before June 20, 1914. There was one message from Davenport to Coeur d'Alene, forty-five cents; one message from Davenport to Sandpoint, fifty-five cents; from Davenport, Washington, to points **[68]** in Washington outside of Spokane, one message, fifty cents; from Coeur d'Alene, one message thirty-five cents; from points in Washington outside of Spokane to Davenport, from Pullman, one ,message, thirty-five cents; Oakesdale, one message, thirty cents.

(A statement showing long distance business was admitted in evidence and marked exhibit #19, and consisted of a letter on the letterhead of the Interstate Utilities Company, fastened to the statement showing long distance business from January 1st to June 25th, 1914, inclusive.)

[Testimony of A. G. Avery, for Defendant.]

A. G. AVERY was called and sworn as a witness on behalf of the defendant, and testified as follows:

My name is A. G. Avery. I have practiced law in Spokane for 27 years, and am a member of the firm

(Testimony of A. G. Avery.)

of Post, Avery & Higgins, and have the matter of investigating the title to the property claimed by Mr. West as belonging to the Davenport Independent Telephone Company in charge. I conferred with Mr. West as to what he claimed as his source of title. I asked him to narrate the history, and the memoranda is here. Mr. West dictated to our stenographer a history. He stated a part of it came through foreclosure proceedings instituted by the Washington Trust Company against the Local and Long Distance Telephone Company. The Washington Trust Company purchased at a foreclosure sale and then sold to Thomas, and the chain is substantially the same as the chain heretofore given at this hearing. He did not claim any other sources of title except the mortgage foreclosure proceedings and the bankruptcy proceedings. He claimed nothing through Reynolds. A transfer was made to the Washington Trust Company, then from the Washington Trust Company to Thomas, trustee, then from Thomas, trustee, to the Davenport Independent Telephone Company. On the other side it came from the Washington Consolidated Telephone Company to West, trustee, from West, trustee, to Smith, and from [69] Smith to Davenport Independent Telephone Company. I investigated the bankruptcy proceedings and concluded that the title was not good or satisfactory. The most glaring defect in the bankruptcy proceedings was the fact that they were started by Humbird & Company and two other creditors having claims aggregating some-

(Testimony of A. G. Avery.)
thing around $3,500.00; that the bankrupt was cited to appear on March 26th of that year, which was 1911, but nothing was done at that time, nor was any continuance taken, but there was on the 10th day of April following an adjudication of bankruptcy. On the 11th day of May the attorneys for Humbird & Company and those other creditors who instituted the proceedings signed a stipulation. This stipulation is found filed on May 13, 1911, and is as follows: "Title of the case, Humbird Lumber Company, R. H. Odgers and J. A. Hurley vs. Washington Consolidated Telephone Company. It is hereby agreed and stipulated between the Humbird Lumber Company, R. H. Odgers and J. A. Hurley, petitioning creditors in the above-entitled matter, and the Washington Consolidated Telephone Company, a corporation, through Freece & Pettijohn, representing such creditors, and H. M. Martin and O. B. Setters, representing said company, that the above-entitled action may be dismissed and an order of dismissal entered herein on this stipulation upon the ground and for the reason that the claims of said petitioning creditors have this day been fully settled and satisfied, including the costs of this proproceedings. Dated this 5th day of May, 1913. Signed, James S. Freece and C. A. Pettijohn, attorneys for the petitioning creditors, and H. M. Martin and O. B. Setters, attorneys for the respondents." This stipulation was filed on May 13, 1913. At the time that stipulation was filed, no appearances by other creditors had been filed in the bank-

(Testimony of A. G. Avery.)

ruptcy proceedings. The next step in the proceeding was that at about the time this stipulation was filed, there was an order made by the referee in bankruptcy or by your Honor, directing the debtor to file a schedule, but nothing appeared in [70] respect to that until about the 23d day of October, in that year, when one W. W. Smith filed what purports to be a schedule and named himself as petitioner, and in the schedule this Humbird and the other two claimants appear. About this date, W. W. Smith petitioned the Court to proceed with said proceedings, and the petition states among other things that no order of dismissal was filed, though it does not state that there was an order of dismissal stipulated for. There is nothing in here that shows any reason why that stipulation should not be observed.

On October 23, 1913, the claims of Humbird Lumber Company, R. H. Odgers, and J. A. Hurley were assigned to Smith. These assignments are dated May 5, 1913, and filed October 23, 1913, and the execution of said assignments is by the attorneys of record of the petitioner. I can't find that the bankrupt corporation ever appeared or was served with anything after the stipulation to dismiss. I found an order based on the Smith petition which is apparently an *ex parte* order, as follows: "Comes on regularly for hearing this 23d day of October, the petitioner, W. W. Smith, creditor of the Washington Consolidated Telephone & Telegraph Company, and holder of all the claims mentioned in

(Testimony of A. G. Avery.)

the original petition for bankruptcy, the same having been assigned to him for good and valuable consideration, and asks the Court therein for an order directing that the bankruptcy proceedings herein be proceeded with at once, and it appearing to the Court that the said W. W. Smith has good and sufficient reason and cause therefor, and the Court being fully advised in the premises, now, therefore, it is by the Court hereby ordered that the said proceedings be proceeded with at once." This order is dated October 23, 1913, and signed by Frank H. Rudkin, Judge.

Mr. West, the trustee in bankruptcy, filed an inventory. That inventory, outside of the personal property referred to, refers to some toll lines for twenty-two miles. There is one item of [71] twelve miles of standard construction in Stevens County, including franchises; ten miles of line semi-standard; eight miles of line with some kind of brackets. There is nothing in the bankruptcy proceedings to locate these lines, that is, where they commence and where they end, or what road they are on. There is nothing in the bill of sale given by the trustee in bankruptcy to locate them. In these proceedings, O. B. Setters appeared originally as attorney for the bankrupt, then as attorney for the trustee, then for the creditor, and then for the purchaser. In the entire bankruptcy proceedings there is great confusion as to what the property is. In the foreclosure proceedings against the Local & Long Distance Telephone Company, I don't think

(Testimony of A. G. Avery.)

there is any title at all. In that case one H. H. Reynolds was a party and was dismissed out of the case, but the findings of fact and conclusions of law Nos. 19, 20 and 21 are as follows:

"That after the execution of said trust deed said Local & Long Distance Telephone Company proceeded to continue to carry on its said business and extended its system to some extent and particularly in the construction of a line known as the Soap Lake line and at all times thereafter continued to conduct its business until in January, 1910, when the property of said corporation was taken possession of by said W. N. Purdy, who was at that time appointed as receiver over the company on an *ex parte* application and later, upon a hearing being had, the said receivership was made permanent.

That after the appointment of said W. N. Purdy as receiver of the Local & Long Distance Telephone Company and upon April 8th, 1911, he, as said receiver of said company, petitioned the Superior Court of Lincoln County for an order permitting him to sell all of the property of whatsoever kind and description belonging to said defendant company and that upon said 8th day of April, 1911, said Superior Court of Lincoln County entered an order directing that said sale be made. That in said petition for said sale and in **[72]** said order directing said sale, no reference whatever was made to the trust deed referred to in plaintiff's complaint herein and upon which the bond issue in this case was based, and said trustee and the plaintiff herein was

in no way made a party or had any notice whatever of said sale. That upon the first day of May, 1911, said receiver reported to said Superior Court of Lincoln County that he had sold said property and all of the same belonging to said defendant company to one H. H. Reynolds for the sum of $10,000.00 in cash and at said time said receiver asked the court to confirm said sale, and that thereupon and upon said first day of May, 1911, an order was entered in said cause in said Superior Court of Lincoln County, confirming said sale by the said receiver to H. H. Reynolds.

That the purchaser at said sale took with full knowledge and notice of the trust deed involved in this action, the same having been properly filed, indexed and recorded in Lincoln County and in Spokane County long prior to said sale, and that the price paid for said property, to wit, the sum of $10,000.00, was far less than the actual value of said property at said time and that in purchasing said property said H. H. Reynolds took the same subject to said trust deed and burdened with the lien thereof."

The net result of this is that the Court finds the legal title in Reynolds, but inasmuch as he must have taken the mortgage with notice of it, he was bound by the mortgage and did not need to be served with process. Until to-day I never knew of any conveyance made by Reynolds to the Washington Consolidated Telephone Company. Mr. West never informed me of anything of that kind. The fact of a conveyance by Reynolds does not change my opin-

(Testimony of A. G. Avery.)

ion. The sale to Reynolds was made May 1, 1911, and the bill of sale to the Washington Consolidated Telephone Company was dated May 8, 1911. The bill of sale was given before the suit was commenced. In the foreclosure case, the Washington Consolidated Telephone Company, being the grantee in the Reynolds bill of sale, appeared, but not in the [73] cross-complaint. In the cross-complaint it was alleged that it was the owner of the property; that was one of the issues tried out in that case; there was no finding as to the ownership except as I have read. The findings of fact and decree were made May 31, 1912. In the findings of fact and decree there is a statement that about five miles of that toll line do not belong to anybody. In the foreclosure proceedings they purported to sell franchises in Wilbur, Ephrata and Davenport. The proceedings provided for by law were not adopted for the purpose of selling those franchises. Remington & Ballinger's Code, Section 521, requires that franchises should be sold by a certain procedure, the initiation of which is filing a copy of the execution or order of sale in the action in the auditor's office, together with a notice in writing that under such execution or order of sale the officer levying the same has levied upon the franchise to be sold, specifying the time and place of sale, the name of the owner of the franchise, the amount of the claim or judgment for the satisfaction of which the franchise is sold, the name of the plaintiff in the action in which the decree of foreclosure or judgment is entered, and by serving

(Testimony of A. G. Avery.)
a copy of such execution or order of sale and notice upon the judgment debtor or his attorney of record, if any, in the action in which judgment was rendered, twenty days prior to the date of sale. None of that was done. It requires a different notice than that which was given. This is a special statute governing the sale of franchises under execution or order of sale.

Cross-examination by Mr. TURNER.

My objection to the bankruptcy proceedings was I thought that the stipulation of the petitioning creditors and the alleged bankrupt that the proceedings might be dismissed prevented any further action by the Court. At that time there was no trustee. There must have been in contemplation a trustee, although the office may not have been filled. My idea of it was this, that in **[74]** the first place it was competent to make a stipulation of that kind, and when they declared in the stipulation that the claim was satisfied and discharged, I thought they had a perfect right, or at least I thought it probable, that they had the right to dismiss and so stipulated, and the Court could enter no other order on the subject of stipulation; but in the event that was not true, I felt very sanguine they could not resurrect and resuscitate the case without notifying the one most interested. I do not think there is any jurisdiction, not at least without notice, after the bankrupt has stipulated to dismiss the case. After a case has gone for adjudication, it is for the benefit of the whole world, and they may come in and file

(Testimony of A. G. Avery.)

claims. I think an *ex parte* order for the case to proceed could not be made without a stipulation by or notice to the bankrupt. I thought the bankruptcy case was deficient in the description of the property. I would not like to say I thought the general description of the property would render void an order of the referee in bankruptcy made at a later period, ordering the sale of all the property, but I thought it rather defective. I would not say that it would be void, but it was not at all satisfactory as a description of the title.

As to the point that Mr. Setters appeared for various parties in the case, this and the fact that the proximity of the sale by the trustee to Smith, and resale back to the Davenport Company, with the appearance of one attorney for everybody, would influence me. I considered in this matter the effect of a judicial sale as curing irregularities of this character.

Q. Consider the fact that if there were any objections of that character, they ought to be set up directly in that proceeding, and did not avail to some third person?

Mr. POST.—That is objected to; that hasn't anything to do with it.

The COURT.—Proceed. **[75]**

A. I did, yes, sir.

Q. You thought that the fact it was a judicial sale and the law requires a direct attack to be made on it and didn't permit a third party to make a collateral attack on it had no effect on the question of title?

(Testimony of A. G. Avery.)

Mr. POST.—I object to that; that is altogether outside of the issues. A person is entitled to a good title and no court of equity will compel a purchaser to take a possible lawsuit where somebody may contest it.

Mr. TURNER.—Did you consider that phase of it?

A. Yes, sir.

Q. What conclusion did you reach with reference to that?

A. That influenced me in giving the decision I did, but I will say that just the angle from which you look at the question, I do not in that particular respect see its application; while I might decide it would require a direct proceeding, that would not necessarily influence me in passing title.

The WITNESS.—(Continuing.) I did not consider that the time for cutting off any right to make a direct attack had expired, nor that an attack had to be made timely and regularly before the court would listen to it. That always holds subject to certain limitations. It occurred to me that the proceedings were nearly, if not absolutely, void.

My first objection to the foreclosure proceedings is that they show Reynolds bought it at a receiver's sale and his purchase was subject to the mortgage, and he was not made a party to the foreclosure proceedings, and therefore he is still the owner of the equity in the property. At the time I passed on the title, I did not know of the bill of sale dated May 11, 1911, but I will not change my mind on it because of

(Testimony of A. G. Avery.)

it. Reynolds was made a party to that suit but was not served. The purchaser at that foreclosure proceeding did not get anything from Reynolds. [76]

Q. I said the purchaser, the Washington Trust Company, received in the foreclosure sale all the right, title and interest of the Washington Consolidated Company.

The COURT.—I do not think an opinion concerning the title has any bearing on the question; that is for the Court to pass on.

The WITNESS.—(Continuing.) My second objection was that the sheriff purported to sell the franchises at Davenport without having levied on them in the manner provided by the statute. I found no other objection except the description of the property was unsatisfactory.

Mr. POST.—I want to put in evidence the pleadings and decree in that Government suit.

(The findings and decree in the case of United States of America vs. American Telephone Company, et al., defendants, were admitted and marked Defendant's Exhibit #20.

The answer of The Pacific Telephone and Telegraph Company and others in the same case was admitted in evidence and marked Defendant's Exhibit #21.

The original petition in the same case was admitted in evidence and marked Defendant's Exhibit #22.

An application for modification of decree in the same case was admitted in evidence and marked De-

(Testimony of A. G. Avery.)

fendant's Exhibit #23.

An order modifying the decree in the same case was admitted in evidence and marked Defendant's Exhibit #24.) [77]

On March 11, 1913, a petition was filed in the District Court of the United States for the Eastern District of Washington, Northern Division, by Humbird Lumber Company, a corporation, R. H. Odgers and J. A. Hurley, stating that they are creditors of the Washington Consolidated Telephone & Telegraph Company, having provable claims aggregating in excess of the security held by them in the sum of five hundred dollars ($500.00); the claim of the Humbird Lumber Company being three thousand five hundred eighty and 30/100 dollars ($3,580.30), the claim of R. H. Odgers being sixty-five and 80/100 dollars ($65.80), the claim of J. A. Hurley being twelve and 65/100 dollars ($12.65). The petitioners represented that the Washington Consolidated Telephone & Telegraph Company being insolvent within four months theretofore, had committed an act in bankruptcy in that a receiver was appointed in the Superior Court of the State of Washington in and for Spokane County, and they asked that the Washington Consolidated Telephone & Telegraph Company be adjudged a bankrupt. On March 11, 1913 a subpoena was issued to the Washington Consolidated Telephone & Telegraph Company requiring it to be and appear at the District Court held in Spokane in the said district on the 26th day of March, 1913, then and there to answer

the petition. On April 10, 1913, the Washington Consolidated Telephone & Telegraph Company was adjudged a bankrupt. On April 10, 1913, reference of the said cause was made to the referee in bankruptcy. On April 29, 1913, an order requiring the bankrupt to file schedules in the proceeding was made. On May 13, 1913, a stipulation signed by James S. Freece and C. A. Pettijohn, attorneys for petitioning creditors Humbird Lumber Company, R. H. Odgers and J. A. Hurley and by H. N. Martin and O. B. Setters, attorneys for the Washington Consolidated Telephone & Telegraph Company, to the effect that the said cause may be dismissed and an order of dismissal entered upon the said stipulation upon the grounds and for the reason that the claims [78] of said petitioning creditors "have this day been fully settled and satisfied, including costs of this proceeding." This stipulation was dated May 5, 1913; filed in the court on May 13, 1913. On October 23, 1913, W. W. Smith filed in the said cause assignments of the claims of Humbird Lumber Company, R. H. Odgers and J. A. Hurley and attached thereto a petition stating that he purchased from the said creditors named in the petition in bankruptcy their claims against the Washington Consolidated Telephone & Telegraph Company and that he was now the lawful holder and owner and asked the court for an order directing that proceedings be proceeded with at once according to law. This petition was filed on October 23, 1913, and on October 23, 1913, Frank H. Rudkin, Judge of the

United States District Court for the Eastern District of Washington, made an order in said cause directing the proceedings to continue at once. On October 25, 1913, schedules showing a list of creditors of the Washington Consolidated Telephone & Telegraph Company, together with the amounts of their several claims, together with a recital that the said claims had been assigned to W. W. Smith, were filed in the said cause. The schedules were signed by W. W. Smith. The first meeting of creditors was noticed for November 7, 1913. On November 7, 1913, the first meeting of creditors was held and A. T. West was named as trustee and his bond was fixed at two thousand dollars ($2,000.00). A bond was furnished and approved by the referee on November 8, 1913. An inventory was filed March 10, 1914, setting forth tools and equipment, office furniture, materials of various kinds appraised at two thousand one hundred fifty-five and 20/100 dollars ($2,155.20), poles distributed on line and in Stevens County and including franchises, six hundred dollars ($600.00), 12¾ miles standard construction, $3,250.00; 10 miles line semi-standard, $2,000.00; 8 miles line, some brackets, $500.00; all of said property and lines, including contracts and franchises, being appraised in the total sum of eight thousand five hundred [79] five and 20/100 dollars ($8,505.20). On April 23, 1914, a petition to sell the property of the bankrupt submitting bids that had been received and reciting that $2,100.00 had been bid by W. W. Smith, which was the highest bid that the trustee thought he could get, was filed. On

April 24, 1914, a notice to creditors was mailed calling a meeting of the creditors for May 5, 1914. At the meeting of the creditors held on May 5, 1914, the referee ordered the property sold and authorized the trustee to sell to W. W. Smith for $2,100.00 all of the assets of the bankruptcy estate and directed that conveyance of said property be made. On May 13, 1914, an account of the trustee in bankruptcy was filed. Another meeting of the creditors was called for May 26, 1914, for the purpose of declaring a dividend and transacting such other business as might properly come before the meeting. On May 27, 1914, at the meeting of the creditors, a dividend of three per cent was declared and the trustee was ordered to pay certain expenses and taxes. On September 11, 1914, the trustee in bankruptcy filed a full and complete report of all funds received and disbursed by him. A meeting of the creditors was called for October 13, 1914, for the purpose of passing on final account and report of the trustee in bankruptcy and to declare a final dividend. On October 14, 1914, the final account and report of A. T. West, trustee in bankruptcy, was approved and attorney's fee of three hundred fifty dollars ($350.00) was allowed to O. B. Setters, attorney for the bankrupt for the proceedings, and a final order of distribution was made after directing certain expenses to be paid. On November 23, 1914, a final discharge of the trustee was made. In these proceedings O. B. Setters was attorney for W. W. Smith, A. T. West the trustee in bankruptcy, and the Washington Consolidated Telephone & Tele-

graph Company the bankrupt. This was according to the endorsements made on the various papers filed by these parties in the cause. [80]

IT IS HEREBY STIPULATED by the parties to the above-entitled cause, through their respective attorneys, that the above and foregoing is an accurate condensation of the evidence taken in the above named case, and, together with the original exhibits, constitutes all of the evidence taken in the said case, and the same may be approved by the Court or the Judge thereof directing that the original exhibits admitted in evidence in the said cause, except such as are set forth in full in the said statement, and except the files in the proceedings in bankruptcy of Washington Consolidated Telephone and Telegraph Company, an abstract of which is contained in the statement, shall be attached to and made a part of said statement; also, that the said condensation, together with the original exhibits and pleadings in the case, orders, opinion and decree, and the several papers evidencing steps taken to perfect an appeal, shall constitute the record on appeal in the said case.

Dated at Spokane, Washington, this 17th day of November, A. D. 1915.

(Signed) TURNER & GERAGHTY,
Attorneys for Plaintiff.
POST, AVERY & HIGGINS,
Attorneys for Defendant. [81]

[Order Approving Statement of Evidence and Directing That Certain Original Exhibits be Attached Thereto.]

United States of America,
Eastern District of Washington,
Northern Division,—ss.

The foregoing statement, in a simple and condensed form, of the evidence taken in the above-entitled cause, being a true and complete statement of said evidence, and properly prepared, is hereby approved; and it is hereby ordered that the original exhibits referred to therein, except such as are set forth in full in said evidence, and except the files in the proceedings in bankruptcy mentioned in the foregoing stipulation, shall be attached to the said statement as a part thereof, to be considered as a part of the record on appeal in said cause.

Dated at Spokane, Washington, this 17th day of November, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge of the District Court of the United States for the Eastern District of Washington.

[Endorsements]: Statement of Facts. Filed in the U. S. District Court for the Eastern District of Washington. November 18, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [82]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY,

Defendant.

Petition for Appeal.

To the Honorable FRANK H. RUDKIN, Judge of the District Court of the United States for the Eastern District of Washington:

The above-named defendant, Pacific Telephone and Telegraph Company, conceiving itself to be aggrieved by the decree made and entered in this cause on the 4th day of September, A. D. 1915, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit. It prays that this, its appeal, be allowed and that a transcript of the record, proceedings and papers upon which said final decree, order and judgment were made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And now at the time of the filing of this petition for appeal, the defendant files an assignment of errors setting forth separately and particularly

each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner, Pacific Telephone and Telegraph Company, further prays that the proper order touching the security to be required of it to perfect its appeal be made, and desiring to supersede the execution of the decree, petitioner here tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued. [83]

(Signed) THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Defendant.
By POST, AVERY & HIGGINS,
Solicitors for the Defendant.

[Endorsements]: Petition for Appeal. Filed in the U. S. District Court for the Eastern District of Washington. September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [84]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109

DAVENPORT INDEPENDENT TELEPHONE COMPANY,
Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

Assignment of Errors.

Comes now the defendant in the above-entitled cause and says that in the decree herein made and entered on the 4th day of September, 1915, there is manifest error, and files the following assignment of errors committed and happening in the said cause, upon which it will rely upon its appeal from said decree:

1. The Court erred in holding that said paper writings set forth in the complaint, which the Court designates a contract, were authorized by the stockholders of the plaintiff, and in holding that the same became a contract without such authorization although the same purport to sell and dispose of the entire property of the corporation plaintiff.

2. The Court erred in holding that this cause was of equitable cognizance and that plaintiff does not have a full, complete and adequate remedy at law.

3. The Court erred in holding that the plaintiff's title to the property in question is a marketable title and in no manner a defective title.

4. The Court erred in holding that the provision in the alleged contract that the title to the property must be acceptable to the attorneys for the defendant is unenforceable, and that the defendant must take and pay for such property even though such title is not acceptable to such attorneys and even though the opinion of such attorneys adverse to the title is neither fraudulent nor [85] capricious.

5. The Court erred in holding that said alleged contract is not in violation of an act of Congress en-

titled. "An Act to protect trade and commerce against unlawful restraints and monopolies," which said law was passed July 2, 1890, and is commonly known as the Sherman Anti-Trust Act, and in holding that said contract is enforceable in equity notwithstanding such act of Congress.

6. The Court erred in holding that said alleged contract is not in violation of a decree entered against this defendant and others in the United States District Court for the State of Oregon in a suit brought by the United States of America as complainant in July, 1913, which decree is referred to in the answer in this cause, and in holding that said contract is enforceable in equity notwithstanding such decree.

7. The Court erred in holding that the said alleged contract is not void and unenforceable under the statute of frauds.

8. The Court erred in holding that the alleged contract is not so indefinite and uncertain in its terms and provisions as to be unenforceable in equity.

9. The Court erred in holding that the plaintiff is entitled to a decree of specific performance as prayed for in the complaint.

10. The Court erred in holding that the plaintiff is entitled to recover from the defendant the sum of $34,623.00 and interest.

(Signed) THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Defendant.
By POST, AVERY & HIGGINS,
Solicitors for the Defendant.

[Endorsements]: Assignment of Error. Filed in the U. S. District Court for the Eastern District of Washington, September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [86]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Order Allowing Appeal.

On this 29th day of September, A. D. 1915, on motion of Post, Avery & Higgins, solicitors and counsel for the Pacific Telephone and Telegraph Company, for an order allowing an appeal and fixing the amount of the bond on appeal and for supersedeas, and the petition for said appeal and for an order fixing the amount of bond, together with an assignment of errors, having been filed in court heretofore, it is

ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore filed and entered herein on September 4, 1915, be and the same is hereby allowed, and that a certified transcript of the record,

testimony exhibits, stipulations and all other proceedings herein be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of Thirty-five Thousand Dollars ($35,000.00), the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Done in open court this 29th day of September, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Allowing Appeal. Filed in the U. S. District Court for the Eastern District of Washington. September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[87]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Appeal and Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: That the Pacific Telephone and Telegraph Company,

a corporation organized and existing under and by virtue of the laws of the State of California, and doing business in the State of Washington, as principal, and the National Surety Company, a corporation authorized to do business as surety in the State of Washington, as surety, are held and firmly bound unto the Davenport Independent Telephone Company, a corporation, in the sum of thirty-five thousand dollars ($35,000), to be paid to the Davenport Independent Telephone Company, a corporation, for the payment of which, well and truly to be made, we bind ourselves jointly and severally and each of our successors and assigns firmly by these presents.

SEALED with our seals and dated this 29th day of September, A. D. 1915.

WHEREAS, lately, at a session of the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said court between the Davenport Independent Telephone Company, as plaintiff, and the Pacific Telephone and Telegraph Company, as defendant, a decree was rendered against the said The Pacific Telephone and Telegraph Company in the sum of Thirty-four Thousand Six Hundred Twenty-three Dollars ($34,623.00), and the said The Pacific Telephone and Telegraph [88] Company, a corporation, having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree in the aforesaid suit, and a Citation directed to the said Davenport Independent Telephone Company is

about to be issued, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California;

NOW, THEREFORE, the condition of this obligation is such that if the said The Pacific Telephone and Telegraph Company, a corporation, shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Principal.
By POST, AVERY & HIGGINS,
Its Solicitors.
NATIONAL SURETY COMPANY,
[Seal] By JAMES A. BROWN,
Resident Vice-president.
By S. A. MITCHELL,
Resident Assistant Secretary. [89]

State of Washington,
County of Spokane,—ss.

On this 29th day of September, A. D. 1915, before me personally appeared S. A. Mitchell, the resident assistant secretary of the National Surety Company, a corporation, with whom I am personally acquainted, who, being by me first duly sworn, stated that he is the resident assistant secretary of the National Surety Company; a corporation; that he knows the corporate seal of said company; that it

was affixed to the foregoing instrument by order of the board of directors of said company, and that he signed said instrument as resident assistant secretary of the said corporation, by the authority of the said board of directors, and that said S. A. Mitchell acknowledged the instrument to be the free and voluntary act and deed of said corporation; that the said National Surety Company, a corporation, is doing business as a surety company in the State of Washington and is authorized to execute this bond, and that it is worth more than double the amount of the bond in property in the State of Washington not exempt from execution.

[Seal] (Signed) FRANK V. DUBOIS,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

The foregoing bond is approved both as to form and sufficiency of surety, both as an appeal and supersedeas bond, this 29th day of September, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Appeal and Supersedeas Bond. Filed in the U. S. District Court for the Eastern District of Washington, September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [90]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Citation.

The President of the United States to the Davenport Independent Telephone Company, a corporation, and to Turner & Geraghty, Its Solicitors, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal filed in the office of the clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein the Davenport Independent Telephone Company, a corporation, is plaintiff and appellee, and the Pacific Telephone and Telegraph Company, a corporation, is defendant and appellant, to show cause, if any there be, why the decree rendered against the said defendant and appellant should not be corrected and why speedy justice

should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 29th day of September, A. D. 1915, and of the Independence of the United States the one hundred and fortieth.

(Signed) FRANK H. RUDKIN,
United States District Judge.

[Seal] (Signed) W. H. HARE,
Clerk. **[91]**

[Endorsements]: Citation. Due and personal service of the above Citation made and admitted, and receipt of a copy thereof acknowledged, this 30th day of September, A. D. 1915. (Signed) Turner & Geraghty, Solicitors for the Davenport Independent Telephone Company. Filed in the U. S. District Court for the Eastern District of Washington. September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[92]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Order Enlarging Time for Filing Record on Appeal.

This Court having on the 29th day of September, 1915, made an order allowing an appeal from the final decree entered in the above-entitled cause and court on September 4th, 1915, to the United States Circuit Court of Appeals for the Ninth Circuit, and having this day signed a Citation directed to the Davenport Independent Telephone Company, the plaintiff above named, and to Turner & Geraghty, its solicitors, citing them or admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, California, within thirty days from September 29th, 1915, and it also appearing to the Court that a condensed statement of the evidence has not been prepared, filed or approved by this Court as required by Section B of Rule No. 75 of Rules of Practice for Courts of Equity of the United States, and it appearing that a praecipe for the record on appeal cannot at this time be filed because the statement of the evidence has not been approved by the Judge of this court, as required by Rule 75 above mentioned, and the Judge of this court and the Judge who signed the Citation will leave the City of Spokane, Washington, this 29th day of September, to go to the City of San Francisco, California, to sit on the Circuit Court of Appeals, and will not return to the City of Spokane, Washington, or to this jurisdiction until on or about November ——, 1915, and it appearing that no opportunity will be [93]

had for the defendant and appellant or its solicitors to lodge and have approved by this Court the statement of the evidence, as required by said Section B of said equity rule of practice No. 75, before the said Judge leaves this jurisdiction nor after his return thereto, nor will the plaintiff and appellee have opportunity to make objections or proposed amendments, within the time so that the transcript of the record may be filed with the Appellate Court on the return day named in the Citation, and it appearing that Rule 16 of Rules of the United States Circuit Court of Appeals for the Ninth Circuit provides that the Judge who signed the Citation, on good cause shown, may enlarge the time for lodging the transcript of the record before its expiration and it appearing that good cause is shown for the enlargement of the time for lodging the said transcript of the record;

It is therefore ORDERED that the time for return named in the Citation issued herein and for filing the record and docketing this cause with the Clerk of the United States Circuit Court of Appeals be and the same is hereby enlarged and fixed at thirty (30) days from the 15th day of November, 1915.

It is further ORDERED that the time for approving and settling the statement of the case in said cause be and the same is hereby extended to the 15th day of November, 1915, and that the time for filing a praecipe for the record on appeal shall be extended until November 15th, 1915.

Done in open court this 29th day of September, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Enlarging Time for Filing Record on Appeal. Filed in the U. S. District Court for the Eastern District of Washington, September 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[94]**

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

Praecipe [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will please certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit the following records, proceedings and papers in the above-entitled cause:

Complaint.

Answer.

Opinion.

Decree.

Abstract and condensation of testimony.

Original exhibits introduced upon the trial except such as are excepted by stipulation herein after mentioned.

Stipulation of the parties relative to the abstract and condensed form of the evidence, and that the original exhibits may be sent up on appeal and considered a part of the record.

Order enlarging the time for preparing and filing the condensed form of evidence.

Order of the Court directing that the original exhibits be sent up on appeal and considered a part of the record on appeal, and

All papers and proceedings on appeal.

Dated at Spokane, Washington, this 19th day of November, A. D. 1915.

(Signed) POST, AVERY & HIGGINS,

Attorneys for Defendant, Pacific Telephone and Telegraph Company.

[Endorsements]: Service of the within praecipe by receipt of a true copy thereof admitted this 19th day of November, A. D. 1915. (Signed) Turner & Geraghty, Attorneys for Plaintiff. Praecipe. Filed in the U. S. District Court for the Eastern District of Washington. November 19, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[95]**

[Certificate of Clerk U. S. District Court to Transcript of Record and Exhibits.]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2109.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States in and for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a full, true, correct and complete copy of so much of the record, pleadings, orders and other proceedings had in said action as the same remain of record and on file in the office of the clerk of said District Court, as called for by defendant and appellant in its praecipe; and that the same constitute my return to the order of appeal from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, lodged and filed in my office on the 29th day of September, 1915.

I further certify that I hereto attach and herewith transmit the original Citation issued in said cause.

I further certify that I hereto attach and herewith transmit original exhibits on file in said action, as follows:

Plaintiff's Exhibit # 2—Inventory.
3—Ordinance No. 147 and Resolution.
4.—Bill of Sale by Reynolds.
5—Summons and Complaint.
6—Sheriff's Return of Sale.
7—Findings of Fact and Conclusions of Law.
8—Bill of Sale by Brockman as Sheriff.
9—Bill of Sale by Washington Trust Company.
10—Bill of Sale by Thomas.
[96] 11—Franchise.
12.—Bill of Sale, Trustee to Smith.
13—Bill of Sale by Smith.
14—Letter, McFarland to West.
15—Resolution, Board of County Commissioners.
Defendant's Exhibit 16—Map.
17—Contracts.
19—Statement Long Distance Business.
20—Decree.
21—Answer.

22—Petition.
23—Application for Modification of Decree.
24—Order Modifying Decree.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amounts to the sum of forty-one dollars and fifteen cents ($41.15), and that the same has been paid in full by Post, *Russell* & Higgins, attorneys for the defendant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said district, this 29th day of November, 1915.

[Seal] W. H. HARE,
Clerk. [97]

[Endorsed]: No. 2693. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Telephone and Telegraph Company, a Corporation, Appellant, vs. Davenport Independent Telephone Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed December 2, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Plaintiff and Appellee,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant and Appellant.

Stipulation [That Original Exhibits may be Considered Without Printing Copies in Record].

IT IS HEREBY STIPULATED AND AGREED by the parties to the above-entitled cause, through their respective attorneys, Turner & Geraghty for the plaintiff and appellee, and Post, Avery & Higgins for the defendant and appellant, that they have heretofore stipulated that the original exhibits admitted in evidence in the trial of said cause in the United States District Court for the Eastern District of Washington, Northern Division, might be attached to the record on appeal and considered as a part of the record; and the Judge of the said District Court has made an order directing that the said original exhibits be sent to this court as a part of the record on appeal herein, and that the same may be considered on the appeal without printing copies of the said exhibits in the record on appeal.

DATED at Spokane, Washington, November 18th, 1915.

TURNER & GERAGHTY,
Attorneys for Plaintiff & Appellee.
POST, AVERY & HIGGINS,
Attorneys for Defendant & Appellant.

[Endorsed]: No. 2693. In the United States Court of Appeals for the Ninth Circuit. Davenport Independent Telephone Company, Plff. & Appellee, vs. The Pacific Telephone and Telegraph Company, Deft. and Appellant. Stipulation. Filed Dec. 2, 1915. F. D. Monckton, Clerk,